STATE OF MICHIGAN
IN THE SUPREME COURT
ON APPEAL FROM THE MICHIGAN COURT OF APPEALS
AND THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

MICHIGAN TOOLING ASSOCIATION WORKERS COMPENSATION FUND, as Subrogee of DISTEL TOOL & MACHINE COMPANY,

Plaintiff-Appellee/Cross-Appellant,

v

FARMINGTON INSURANCE AGENCY, LLC,

Defendant/Third-Party Plaintiff-Appellant/Cross-Appellee,

and

MACHINERY MAINTENANCE SPECIALISTS, INC.,

Defendant,

and

EMPLOYERS INSURANCE OF WAUSAU and WAUSAU INSURANCE COMPANIES,

Third-Party Defendants-Appellees.

UNPUBLISHED
December 7, 2004

No. 249013
Oakland Circuit Court
LC No. 2001-030684-CK

APPLICATION ON BEHALF OF DEFENDANT AND THIRD-PARTY PLAINTIFF-APPELLANT FARMINGTON INSURANCE AGENCY, L.L.C. FOR LEAVE TO APPEAL AN OPINION OF THE COURT OF APPEALS DATED DECEMBER 7, 2004

****NOTICE OF HEARING FOR MARCH 1, 2005****
****EXHIBITS****
****PROOF OF SERVICE****

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Court Rules

Statutes

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Miscellaneous

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STATEMENT IDENTIFYING ORDERS BEING APPEALED AND RELIEF SOUGHT FROM THE SUPREME COURT

The Defendant/Third Party Plaintiff-Appellant, Farmington Insurance Agency, LLC ("FIA"), filed an appeal as of right pursuant to MCR 7.203(A)(1) from a Final Judgment entered by the Oakland County Circuit Court on May 28, 2003, and the Order Denying a Motion on behalf of FIA to Amend Findings of Fact and Conclusions of Law entered by the Oakland County Circuit Court on March 6, 2003. (Copy of Judgment dated May 28, 2003 and Order dated March 6, 2003 attached hereto. Also attached is the Opinion and Order dated December 13, 2002, setting forth the Oakland County Circuit Court's original Findings of Fact and Conclusions of Law following a bench trial.)

On December 7, 2004, the Court of Appeals issued an Opinion affirming the final judgment entered against the Defendant/Third Party Plaintiff, FIA (copy of Opinion attached hereto). In its Opinion, the Court of Appeals held that the Defendant insurance agency, FIA, owed a duty of care to Plaintiff's subrogor, Distel Tool & Machine Company ("Distel Tool") arising out of a certificate of insurance issued by FIA to Co-Defendant Machinery Maintenance Specialists, Inc. ("MMS"), FIA's client and a contractor with Distel Tool. According to the Court of Appeals, a duty of care arises solely because Distel Tool was a member of a reasonably foreseeable class of Plaintiffs who are entitled to rely upon certificates of insurance issued on behalf of the insured by an insurance agent as proof of effective workers's compensation liability coverage and regardless of undisputed evidence that:

1. FIA did not know the identity of Distel Tool, did not directly provide the information to Distel Tool, or was not otherwise in control over or involved in the transaction;

2. FIA did not intend for or know that Distel Tool would subsequently rely upon information provided one month earlier for the benefit of another third party;

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3. Distel Tool's reliance upon an expressly qualified certificate issued previously for the benefit of another was neither justified nor reasonable.

The Court of Appeal's decision to impose a new duty of care upon insurance agents is not only in direct contravention of the record in this matter, but is also in complete contravention of Michigan authority regarding duty of care in general, and the tort theory of negligent misrepresentation in particular, as well as compelling authority from sister jurisdictions who have previously confronted the issue of first impression raised here.

The Court of Appeals compounded its error by refusing to consider undisputed evidence of comparative fault on the part of Distel Tool and MMS, and the Third Party Defendant, Employers Insurance of Wausau/Wausau Insurance Companies (hereinafter "Wausau").

The Court of Appeals decision to impose a completely open-ended and strict scope of liability upon the Defendant insurance agent, also stems from the Court's explicable and reversible refusal to consider compelling factors mitigating against the imposition of a duty, and thereafter exclusive fault, such as: deference to legislative authority; the burdens of consequences of expanding the scope of insurance agent liability to persons beyond the insured clients; and other policy considerations.

Hence, the Defendant/Third Party Plaintiff-Appellant, FIA, respectfully requests this Supreme Court to grant leave to review the clearly erroneous Court of Appeals decision that dangerously and otherwise improperly expands the scope of tort liability of insurance agents in favor of unknown and unforeseeable non-client third party recipients of expressly qualified information contained within certificates of insurance.

Alternatively, FIA respectfully requests this Court to peremptorily reverse the final judgment in its entirety, or, make its own determinations regarding the comparative fault of the parties based upon the record or remand with instructions that the Trial Court determine the

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percentages of fault attributable to MMS, Distel Tool and Wausau after properly and fully considering the nature of each of these parties' conduct and the full extent of the causal relationship between the conduct and the Plaintiff's damages.

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STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

MICHIGAN TOOLING ASSOCIATION
WORKERS' COMPENSATION FUND,
in its own right and as Subrogee of
DISTEL TOOL & MACHINE CO.,

Plaintiff,

-vs-

FARMINGTON INSURANCE AGENCY, L.L.C.,
a Michigan Limited Liability Corporation
and MACHINERY MAINTENANCE
SPECIALISTS, INC., a Michigan Corporation,

Defendants,

and

FARMINGTON INSURANCE AGENCY, L.L.C.,
a Michigan Limited Liability Corporation,

Third Party Plaintiff,

-vs-

EMPLOYERS INSURANCE OF WAUSAU,
a Mutual Company, and WAUSAU
INSURANCE COMPANIES,

Third Party Defendants.

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CORRECTED FINAL JUDGMENT

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CORRECTED FINAL JUDGMENT

At a session of said court held in the courthouse in the city of Pontiac, county of Oakland, state of Michigan

on MAY 2 8 2003

Present: HONORABLE COLLEEN A. O'BRIEN
Circuit Court Judge

This case having come on for non-jury trial, proofs having been taken, argument having been entertained, the Court having received and considered Proposed Findings of Fact and Conclusions of Law submitted by the parties, the Court having filed its written Opinion and Order on December 13, 2002 deciding the controversy before it, a Judgment having been entered on February 5, 2003, the parties having stipulated pursuant to MCR 2.612 and 2.613 that the original Judgment inadvertently omitted the disposition of the Third-Party claims against and failed to name the Third-Party Defendant, WAUSAU INSURANCE COMPANIES, and did not include additional attorney's fees awarded by Order dated March 26, 2003, and therefore, that the Judgment required correction, and the Court having otherwise been fully advised:

IT IS HEREBY ORDERED AND ADJUDGED that the Corrected Final Judgment in this matter shall be as follows:

1. Plaintiff Michigan Tooling Association Workers Compensation Fund shall have Judgment against Defendant Machinery Maintenance Specialist, Inc., in the amount of $130,000.00 on Count I of the Complaint, no costs, no interest; and

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2. Plaintiff Michigan Tooling Association Workers Compensation Fund shall have Judgment against Defendant Farmington Insurance Agency, L.L.C., in the amount of $153,502.85 on Count III of the Complaint, shall recover case evaluation sanctions and costs in the amount of $35,825.00 representing attorney fees incurred as a result of Defendant's conditional acceptance of the evaluation, shall recover expert witness costs in the amount of $3,225.00 and shall recover interest from date of filing to date of satisfaction at the prescribed rate in accordance with MCL 600.6013; and

3. Plaintiff Michigan Tooling Association Workers Compensation Fund shall recover nothing on Count II of the Complaint and Count II is dismissed; and

4. Third-Party Defendants Employers Insurance of Wausau and Wausau Insurance Companies shall have judgment against Third-Party Plaintiff, Farmington Insurance Agency, L.L.C., No Cause for Action on the Third-Party Complaint, no costs or attorney fees awarded; and

5. This is the Corrected Final Judgment disposing of all claims and causes of action asserted.

A TRUE COPY
G. WILLIAM CADDELL
Oakland County Clerk - Register of Deeds
By _____ Deputy

COLLEEN A. O'BRIEN
CIRCUIT COURT JUDGE

Approved as to form:

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STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

MICHIGAN TOOLING ASSOCIATION,
WORKERS' COMPENSATION FUND,
In its own right and as Subrogee of
DISTEL TOOL & MACHINE CO.,

Plaintiff,

v

CASE NO. 01-030684-CK
Hon. Colleen A. O'Brien

FARMINGTON INSURANCE AGENCY,
L.L.C., a Michigan limited liability
Corporation and MACHINERY
MAINTENANCE SPECIALITS,
INC., a Michigan corporation,

Defendants.

And

FARMINGTON INSURANCE AGENCY, INC.,
A Michigan limited liability corporation,

Third-Party Plaintiff,

v

EMPLOYERS INSURANCE OF WAUSAU,
a Mutual Company, and
WAUSAU INSURANCE COMPANIES,

Third-Party Defendants.

ORDER

This matter is before the Court on Defendant Farmington Insurance Agency, L.L.C.'s Motion to Amend Findings of Fact and Conclusions of Law. Pursuant to MCR 2.119(E)(3), the Court has dispensed with oral argument. The

Court having reviewed the motion, and otherwise being fully advised in the premises;

IT IS HEREBY ORDERED that Defendant's motion is DENIED for lack of merit on the grounds presented.

IT IS SO ORDERED.

COLLEEN A. O'BRIEN

Dated: MAR 0 6 2003

Hon. Colleen A. O'Brien

A TRUE COPY
G. WILLIAM CADDELL
Oakland County Clerk/Register of Deeds

Deputy

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

MICHIGAN TOOLING ASSOCIATION,
WORKERS' COMPENSATION FUND,
In its own right and as Subrogee of
DISTEL TOOL & MACHINE CO.,

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CASE NO. 01-030684-CK
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FARMINGTON INSURANCE AGENCY,
L.L.C., a Michigan limited liability
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And

FARMINGTON INSURANCE AGENCY, INC.,
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EMPLOYERS INSURANCE OF WAUSAU,
a Mutual Company, and
WAUSAU INSURANCE COMPANIES,

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OPINION AND ORDER

A bench trial was held in this matter on February 22, 2002, April 8, 2002, June 19, 2002 and August 28, 2002 based on Plaintiff's Complaint and Third Party Plaintiff's Complaint. Pursuant to the same, the Court finds as follows:

Plaintiff Michigan Tooling Association Worker's Compensation Fund (hereinafter "MTA") is a group of self-insured employers authorized to self-insure their respective workers' disability compensation exposure in accordance with MCL 418.611 et seq. Plaintiff Distel Tool Machine Company (hereinafter "Distel Tool) is a member of MTA. MTA is the subrogee of Distel Tool. MTA and Distel Tool are also collectively referred to as Plaintiff.

Defendant and Third Party Plaintiff Farmington Insurance Agency (hereinafter "FIA") is a licensed independent insurance agency. Defendant Machinery Maintenance Specialist, Inc. (hereinafter "MMS") is engaged in the business of heavy machine repair.

Third-Party Defendants Employers Insurance of Wausau and Wausaw Insurance Companies ((hereinafter collectively referred to as "Wausau"), are foreign corporations licensed and authorized to sell insurance within the State of Michigan, including workers' compensation insurance.

Count I of Plaintiff's Complaint sought indemnity against Defendant Machine Maintenance Specialist Inc. The Court granted a directed verdict for Plaintiff in regard to Count I during the bench trial on June 19, 2002.

Count II of Plaintiff's Complaint alleges breach of contract against FIA. Count III of Plaintiff's Complaint alleges negligence against FIA.

Count I FIA's Third-Party Complaint alleges negligence against Wausau.

The aforesaid claims arise out of an incident that occurred on April 1, 1998, wherein an individual, Tives Staten, was injured while working on the premises of Distel Tool. At the time of the incident, Staten was employed by MMS.

MMS had obtained a workers' compensation policy of insurance through FIA. The policy was issued through the Michigan Worker's Compensation Placement Facility with Wausau as the carrier. The policy had an effective date of September 30, 1997 through September 30, 1998.

On or about January 29, 1998, MMS received a Notice of Cancellation from Wausau for the policy. The cancellation was to be effective February 20, 1998. FIA was shown as an intended addressee on the cancellation notice. A copy of the notice to FIA was never returned to Wausau as undeliverable. However, FIA denies ever receiving their copy of the cancellation notice.

On or about March 6, 1998, the owner of MMS, Arnold Primak, went to FIA and requested that they issue a Certificate of Insurance so that he could perform a job for David Freedman Inc. On or about March 6, 1998, FIA issued a Certificate of Insurance with Freedman named as the Certificate holder. At no time did Primak advise the FIA agency employees that he had received a Notice of Cancellation from Wausau.

Around the same time period, MMS also wanted to perform work at Distel Tool. The owner of Distel Tool, Richard Distel, demanded that Primak provide proof of insurance before any of his employees would be permitted to enter Distel's premises. In response, Primak provided a photocopy of a Certificate of Insurance, with Freedman shown as the Certificate holder. This Certificate of Insurance was accepted by Distel. Thus, Distel relied on the Certificate of Insurance as proof that MMS was insured, even though Distel was not named as the Certificate holder.

All parties agree that there was, in fact, no insurance in effect on the date that FIA issued the Certificate of Insurance. Thus, there was no insurance in effect for MMS on the day of April 1, 1998, when their employee, Staten, was injured on the premises of Distel Tool. However, Distel Tool was determined to be the "statutory employer" for purposes of payments and benefits due Staten under the Worker's Compensation Act .

MTA ultimately paid $130,000.00 to settle an open award of Worker's Compensation benefits payable to Staten. MTA also paid $23,502.85 in legal fees to defend the Staten claim.

MTA has a judgment in this matter against Arnold Primak in the amount of $153,502.85. MTA now seeks judgment against Defendant FIA for the same based on FIA's alleged negligent issuance of the Certificate of Insurance to Freedman, which was relied upon by their subrogee Distel Tool.

MTA argues that FIA had no common law, statutory, contractual or implied authority to issue the Certificate of Insurance. MTA contends that the

Procedure HandBook of the Michigan Worker's Compensation Placement Facility provides that Certificates of Insurance are to be issued by the Servicing Center, which in this case would be Wausau.

It is uncontested that FIA did not contact Wausau before issuing the policy. Furthermore, Wausau Insurance Company never extended written or verbal authority to FIA to issue the Certificate of Insurance on Wausau policies.

FIA agrees that the procedures of the Placement Facility allow an agent to issue a Certificate of Insurance only with the permission of the Servicing Center. However, FIA contends that it had the implied authority of Wausau to issue the Certificate. FIA argues that it was common practice to issue a Certificate of Insurance on Wausau policies that were being assigned through the Placement Facility without first contacting them for authority. FIA contends that this was a course of conduct that had developed over the years between themselves and Wausau.

FIA contends that they never received a Notice of Cancellation from Wausau, which cancelled the policy effective February 20, 1998. FIA further contends that Arnold Primak, owner of MMS, never told them that his policy was cancelled. FIA contends that if they had known the same they never would have issued the March 6, 1998 Certificate of Insurance to Freedman.

FIA argues that they never sent a Certificate of Insurance to Plaintiff's subrogee Distel. Therefore, there would have been no reason for Distel to have reasonably relied on the Certificate of Insurance since it had been issued to another party.

FIA has joined Wausau in this matter as a Third-Party Defendant. In the Third-Party Complaint filed by FIA against Wausau, FIA alleges a theory of negligence against Wausau for failing to notify FIA of the cancellation of the workers compensation policy issued to MMS after Wausau received the certificate of insurance. FIA maintains that Wausau is at fault in this matter for failing to send a Notice of Cancellation to FIA and for failing to notify FIA of the cancellation when they received a copy of the Certificate of Insurance issued to Freedman. FIA argues that "but for" Wausau's negligence, the present situation would not have occurred.

Wausau takes the position that it did in fact issue a Notice of Cancellation for MMS's Worker's Compensation policy effective February 20, 1998. This was issued due to MMS's failure to pay premiums. Evidence indicated that a Notice of Termination of liability was sent to the Michigan Department of Consumer and Industry Services in Lansing on January 23, 1998. Further, the Notice of Cancellation was sent to MMS by certified mail and to FIA by regular mail.

Wausau denies ever receiving a copy of the Certificate of Insurance from FIA. Wausau argues that FIA never had written authority from Wausau to issue a Certificate of Insurance to Freedman nor did they have implied consent. FIA made no attempt to confirm coverage with Wausau prior to issuing the Certificate of Insurance. Wausau argues that if Plaintiff had followed the rules of the Placement Facility, the Certificate to Freedman, which was relied upon by Distel Tool, would have never been issued.

The Court first addresses Count II of Plaintiff's Complaint. In Count II, MTA alleges breach of contract against FIA. MTA alleges that in January 1995, MMS and FIA entered into a contract whereby FIA would place and service MMS' workers compensation insurance. MTA alleges that Distel was the known and intended third party beneficiary of the contract to the extent that FIA issued Certificates of insurance for Distel's benefit.

Third party beneficiary law in Michigan is controlled by statute. MCL 600.1405; MSA 27A.1405 provides in pertinent part:

> Any person for whose benefit a promise is made by way of contract, as hereinafter defined, has the same right to enforce said promise that he would have had if the said promise had been made to him directly as the promisee.
>
> (1) A promise shall be construed to have been made for the benefit of a person whenever the promisor of said promise has undertaken to give or to do or refrain from doing something directly to or for said person.

Therefore, the question is whether FIA undertook to do "something directly to or for" Distel. An objective standard is to be used for this determination, and the parties' subjective motives and intentions are irrelevant. Reith-Riley Construction Co Inc v Department of Transportation, 136 Mich App 425; 357 NW2d 62 (1984) lv denied 422 Mich 911 (1985) Frich v Patrick, 165 Mich App 689; 419 NW2d 55 (1988) lv denied 431 Mich 871 (1988).

Where the contract is primarily for the benefit of the parties thereto the mere fact that a third person would be incidentally benefited does not give that third person the right to recover for its breach. Reith-Riley, supra at 430-431.

Not everyone who benefits in some way from a contract can be classified as a third party beneficiary so as to be able to stand in the promisees shoes and recover under the contract. Greenless v Owen Ames Kimball Co., 340 Mich 670, 66 NW2d 227 (1954).

In Reith-Riley, supra at 432, the Court stated:

> Therefore utilizing an objective test in looking at the contract here involved, the question is, did Defendant make a promise to do something directly to or for Plaintiff?

Here, when FIA issued a policy to MMS for Worker's Compensation coverage, it cannot be said that Defendant promised to do anything directly to or for Distel in this case. Richard Distel admitted in his trial testimony that he had no contact whatsoever with FIA and, in fact, was unfamiliar with FIA. Distel asked Primak to obtain the Certificate of Insurance and that Certificate was delivered to Distel by Primak, the owner of MMS, and not by FIA.

Furthermore, the Certificate of Insurance, relied upon by Distel, did not identify Distel as the Certificate holder. Both David Clappison and Becky Steingold, employees of FIA, testified that they were totally unaware of the existence of Distel. Furthermore, they had not been asked by Primak to issue the Certificate of Insurance for Distel.

In view of the same, the Court finds that Plaintiff failed to prove the necessary elements under a third party beneficiary theory. Therefore, Plaintiff is not entitled to recover under Count II of the Complaint.

The Court next addresses Count III of Plaintiff's Complaint. In Count III, Plaintiff alleges negligence on the part of FIA. Plaintiff alleges that FIA breached

the standard of reasonable care by issuing a Certificate of Insurance for Distel's benefit without first confirming that the policy of insurance was in effect.

A prima facie case for negligence requires proof of four elements:

1. A duty owed to the plaintiff by the defendant;
2. A breach of that duty;
3. Causation; and
4. Damages.

Schneider v Nectarine Ballroom, Inc., (on remand) 204 Mich App 1, 4 (1994).

The question of whether a duty exists is one of law for the Court to decide. In determining whether a duty exists, courts look to different variables, including:

1. Foreseeability of the harm;
2. Degree of certainty of injury;
3. Existence of a relationship between the parties involved;
4. Closeness of connection between the conduct and injury;
5. Moral blame attached to the conduct;
6. Policy of preventing future harm;
7. The burdens and consequences of imposing a duty and the resulting liability for breach.

Terry v City of Detroit, 226 Mich App 418, 424 (1997), citing Prosser & Keaton, Torts (5th Ed, Sec. 53, p 329, note 24) (other citations omitted).

As stated by the Court in Terry, supra at 424:

> "Duty is actually a 'question of whether the Defendant is under any obligation for the benefit of the particular Plaintiff and concerns the problem of the relation between individuals which imposes upon one a legal obligation for the benefits of the other'"

Based on Terry, supra, the Court finds that FIA did owe a duty to Plaintiff in this matter.

Here, the risk of foreseeability of harm to employers such as Distel would be one of reasonable certainty. The Court finds it would be foreseeable that a party such as Distel would in fact rely on the Certificate of Insurance issued to Arnold Primak, even though they were not the Certificate holder. It is not unreasonable to assume that parties other than the Certificate holder Freedman would accept the Certificate of Insurance as evidence that insurance was, in fact, in effect for MMS; thus, allowing MMS's employees to enter their premises for work purposes. It is not unreasonable to then expect that thereafter an injury could occur on the premises of a company such as Distel.

Moreover, the Court finds there was, in fact, a relationship between the parties, although not a direct one. Their relationship exists through the Michigan Worker's Compensation Act. Plaintiff was considered a statutory employer for purposes of the Act, and Defendant FIA was an agency providing insurance to employers through the Worker's Compensation Placement Facility. Plaintiffs were in a class of parties who could reasonably rely on Certificates of Insurance issued through agencies such as FIA. As a direct result of Defendant's actions, Plaintiff suffered damages for which it would not have otherwise been responsible.

Furthermore, the Court believes that it would serve public policy in preventing future harm if Defendant FIA bears liability in this matter since they

are the party that disregarded the rules of the Worker's Compensation Placement Facility. Liability in this matter may prevent a future situation from occurring by encouraging FIA and other agencies to follow the placement rules by contacting the servicing insurance company in the future before issuing certificates of insurance.

The Court finds that FIA breached its duty to Plaintiff by issuing a Certificate of Insurance when, in fact, there was no coverage in effect. Defendants were negligent in that they failed to follow the rules of the Worker's Compensation Placement Facility, which required FIA to receive authority from the insurer, Wausau, before issuing a Certificate of Deposit.

The Court finds FIA liable for issuing the Certificate of Insurance in this matter without the proper authority. Kaminskas v Litnianski, 51 Mich App 40, 47 (1973). The Court recognizes that Defendant presented expert testimony, which indicated that it is common practice in the industry for an insurance agent to issue policies of Worker's Compensation Insurance without express authority. However, this does not excuse FIA from its negligent actions.

As a direct result of FIA's actions in issuing the inaccurate Certificate of Insurance, Distel allowed the MMS employee to enter their property and then sustained damages as a result of the employee's injury. When Staten was injured, Plaintiff became responsible to pay his Worker's Compensation bills and attorney fees defending the matter.

Therefore, this Court finds that as a result of FIA's negligence, Plaintiff has been damaged in the amount of $153,502.85.

The Court next addresses FIA's Third-Party Complaint against Wausau. FIA alleges that Wausau had a duty to notify FIA of the cancellation of MMS's Worker's Compensation Policy when it cancelled the same on or about February 20, 1998. FIA argues that Wausau breached that duty and never sent notice to FIA. FIA contends that Wausau is at fault in this matter because the Certificate of Insurance would have never been issued if Wausau had followed the proper procedures.

Wausau contends that it did in fact issue a Notice of Termination of liability on January 23, 1998. That notice, which was sent to the Michigan Department of Consumer & Industry in Lansing, is stamped as received by the State of Michigan on January 30, 1998. Wausau provided evidence that the Notice was sent by certified mail to MMS and regular mail to FIA at FIA's correct address. The cancellation became effective on February 20, 1998 after Mr. Primak failed take any action to prevent the cancellation.

Wausau denies it ever received a copy of the Certificate of Insurance, which FIA allegedly mailed to it after the same was issued to Walter Primak. Wausau points out that there is no confirmation that a copy of the Certificate of Insurance was ever mailed to Wausau. Wausau also points out that the mailing address of Wausau did not appear anywhere on the Certificate of Insurance.

Wausau argues that FIA had neither the implied or express consent necessary from Wausau when FIA issued the Certificate of Insurance. Wausau argues that the Michigan Worker's Compensation Placement Facility provides that a Certificate of Insurance can be issued only after the servicing carrier, in

this case Wausau, authorizes the same. Wausau contends that FIA made no effort to contact Wausau prior to doing so. This was unrebutted at the time of trial. Wausau argues that if FIA had followed the rules of the Placement Facility the Certificate of Insurance would never have been issued.

However, this Court finds no evidence of negligence on the part of the Wausau. Wausau's evidence indicates that Notice of Cancellation was mailed to FIA. Further, there is no evidence that Wausau ever received the Certificate of Insurance from FIA. More importantly, the Court finds that if FIA had followed the policies of the Michigan Worker's Compensation Facility and contacted the Third-Party Defendant, this situation would have never occurred.

The Court finds the evidence establishes that Wausau never received a copy of the Certificate of Insurance. Therefore, Wausa had no duty to provide any further notification to FIA. Because Wausau did not receive the Certificate of Insurance issued to Freedman, Wausau could not have foreseen the harm or possible injury to Distel Tool because it had no knowledge of Distel Tool. Where events leading to an injury are not foreseeable there is no duty. Johnson v Detroit, 457, Mich 696, 711 (1998).

Therefore, the Court finds Defendant Wausau is not liable on the Third-Party Complaint and denies FIA relief for the same.

Date: DEC 13 2002

COLLEEN A. O'BRIEN Circuit Judge

COLLEEN A. O'BRIEN

A TRUE COPY
G. WILLIAM CADDELL
Oakland County Clerk/Register of Deeds

13

Deputy

STATE OF MICHIGAN

COURT OF APPEALS

MICHIGAN TOOLING ASSOCIATION WORKERS COMPENSATION FUND, as Subrogee of DISTEL TOOL & MACHINE COMPANY,

Plaintiff-Appellee/Cross-Appellant,

v

FARMINGTON INSURANCE AGENCY, LLC,

Defendant/Third-Party Plaintiff-Appellant/Cross-Appellee,

and

MACHINERY MAINTENANCE SPECIALISTS, INC.,

Defendant,

and

EMPLOYERS INSURANCE OF WAUSAU and WAUSAU INSURANCE COMPANIES,

Third-Party Defendants-Appellees.

UNPUBLISHED
December 7, 2004

No. 249013
Oakland Circuit Court
LC No. 2001-030684-CK

Before: Borrello, P.J., and Murphy and Neff, JJ.

PER CURIAM.

Defendant Farmington Insurance Agency ("Farmington") appeals as of right from an order holding it liable for breaching a standard of care owed to a party who relied on an erroneous certificate of insurance. Plaintiff Michigan Tooling Association Workers Compensation Fund ("Michigan Tooling") cross-appeals from the trial court's decision to allow Farmington to amend its pleadings near the end of the trial. We affirm.

On March 6, 1998, Farmington issued a certificate of insurance certifying that Michigan Maintenance Specialists, Inc. (MMS) was covered by workers compensation insurance provided by Wausau.[1] However, Wausau had cancelled that coverage on February 20. Although the named "certificate holder" on the face of the certificate was David Friedman, Inc., Distel Tool & Machine Company ("Distel") obtained a copy of the certificate and, in reliance on its accuracy, allowed an MMS employee to perform work on Distel's premises. The employee was injured, and Michigan Tooling, on behalf of Distel, paid the employee's worker's compensation award.

I

Farmington argues on appeal that it owed no duty to Distel. We disagree. This Court reviews de novo questions of law and reviews for clear error a trial court's findings of fact. *Meredith Corp v Flint*, 256 Mich App 703, 711-712; 671 NW2d 101 (2003). Whether a duty exists is a question of law. *Harts v Farmers Ins Exchange*, 461 Mich 1, 6; 597 NW2d 47 (1999). However, whether circumstances exist giving rise to that duty is a question of fact. *Howe v Detroit Free Press*, 219 Mich App 150, 156; 555 NW2d 738 (1996).

As the trial court correctly recognized, the duty issue hinges on foreseeability. Although the courts consider a number of factors to determine whether a legal duty exists, "the lowest threshold requirement [is] that the harm incurred was foreseeable." *Valcaniant v Detroit Edison Co*, 470 Mich 82, 86-87; 679 NW2d 689 (2004).

The trial court's written opinion found that:

> Here, the risk of foreseeability of harm to employers such as Distel would be one of reasonable certainty. The Court finds it would be foreseeable that a party such as Distel would in fact rely on the Certificate of Insurance issued to Arnold Primak, [the owner of MMS] even though they were not the Certificate holder. It is not unreasonable to assume that parties other than the Certificate holder Freedman would accept the Certificate of Insurance as evidence that insurance was, in fact, in effect for MMS; thus, allowing MSS's employees to enter their premises for work purposes. It is not unreasonable to then expect that thereafter an injury could occur on the premises of a company such as Distel.
>
> Moreover, the Court finds there was, in fact, a relationship between the parties, although not a direct one. Their relationship exists through the Michigan Worker's Compensation Act. Plaintiff was considered a statutory employer for purposes of the Act, and Defendant FIA [Farmington] was an agency providing insurance to employers through the Worker's Compensation Placement Facility. Plaintiffs were in a class of parties who could reasonably rely on Certificates of Insurance issued through agencies such as FIA. As a direct result of Defendant's

---

[1] We use the term "Wausau" to refer to Employees Insurance of Wausau and Wausau Insurance Companies, which, although named as separate parties, are apparently in essence a single party.

actions, Plaintiff suffered damages for which it would not have otherwise been responsible.

Farmington apparently did not deal with Distel and was not aware Distel existed until after the injury, so Farmington argues that Distel was unforeseeable. However, a party who renders a service to another "which he should recognize as necessary for the protection of a third person or his things" may be liable for harm that befalls the third person if the party failed to exercise reasonable care in the execution of "a duty owed by the other to the third person." *Fultz v Union-Commerce Assoc*, 470 Mich 460, 464; 683 NW2d 587 (2004). Farmington contended throughout the trial that only a named certificate holder was entitled to rely on a certificate of insurance, but the evidence showed that the only benefit to being a certificate holder was a right to be provided notice of subsequent cancellations. Otherwise, the informational content of a certificate of insurance is generally to be relied on as accurate. Distal was clearly in a class of foreseeable parties who might rely on the certificate of insurance issued by Farmington and a party to whom Farmington therefore owed a duty of care. See *Williams v Polgar*, 391 Mich 6, 18; 215 NW2d 149 (1974). Distal was entitled to rely on the certificate as accurate.

Farmington argues that this Court rejected such a broad imposition of duty on professionals to third parties who might rely on their work in *Stockler v Rose*, 174 Mich App 14, 35-37; 436 NW2d 70 (1989). However, this Court actually found it unnecessary to determine whether a broad test should apply to accountants, and took a more restrictive approach on the basis of the specific facts of the case, where the work in question contained the *client's* representations, and the accountant in question had limited control over the contents. *Id.* Thus, *Stockler* does not affect the analysis in the present case.

However, Farmington argues that this Court should not impose a duty for policy reasons.[2] Farmington argues that even the named certificate holder should not be able to rely on the certificate as accurate on any date other than the date it was issued. The face of the certificate implies the possibility that the insured's policies might be cancelled at any time and that the certificate holder might not be informed. However, this Court in *Williams* noted that liability to third parties for negligent misrepresentation did not convert a title abstracter into a title insurer. *Williams*, *supra*. Liability is not imposed solely on the basis of the information being incorrect, but whether Farmington failed "to perform in a diligent and reasonably skillful workmanlike manner." *Id.* at 21. The only question on appeal is whether Farmington owed Distel a duty – but the existence of a duty is only one element of negligence. The existence of a duty will not necessarily result in the unlimited liability Farmington alleges.

---

[2] The trial court took a different view, finding that, "Furthermore, the Court believes that it would serve public policy in preventing future harm if Defendant FIA bears liability in this matter since they are the party that disregarded the rules of the Worker's Compensation Placement Facility. Liability in this matter may prevent a future situation from occurring by encouraging FIA and other agencies to follow the placement rules by contacting the servicing insurance company in the future before issuing certificates of insurance."

In any event, the evidence establishes that Farmington is only obligated to exercise care to ensure that the information in a certificate of insurance is accurate when it is issued: therefore, logically, Farmington is *not* obligated to *guarantee* the accuracy of the information, nor is Farmington obligated to inform any non-named parties of subsequent cancellations. Because it was foreseeable that a class of plaintiffs including Distel might rely on the accuracy of the information in Farmington's certificate of insurance, Farmington owed Distel a duty to prepare the certificate of insurance in a "diligent and reasonably skillful workmanlike manner." *Williams*, *supra*. Because Farmington only argues that it did not owe Distel a duty, we have no occasion to consider whether, as the trial court found, Farmington actually breached that duty.[3]

II

Farmington also argues that the trial court should have apportioned comparative fault among the entities involved in this action. We disagree. Interpretation and application of the comparative fault statutes are questions of law. *Holton v A+ Ins Assoc, Inc*, 255 Mich App 318, 322; 661 NW2d 248 (2003). Notwithstanding "but-for" causation, proximate cause will bar a finding of comparative fault unless the defendant proves "that, in light of the foreseeability of the consequences of the [party's] at-fault conduct, the [party] should be held legally responsible for such consequences, i.e., it is socially and economically desirable to hold the [party] liable." *Lamp v Reynolds*, 249 Mich App 591, 599-600; 645 NW2d 311 (2002).

Farmington argues that Distel was at fault for relying on the certificate of insurance. However, the evidence showed that the contents of a certificate of insurance may generally be relied on to be accurate. If a party is entitled to rely on the accuracy of the certificate's contents, the party should not logically be expected to predict the fact that it was erroneous. Moreover, an insurance agent is in a better position to ensure the accuracy of the certificate's contents, and it would be absurd to require a party entitled to rely on those contents to verify them. Therefore, it is neither logical nor economical to hold liable a party who relies on the contents of the certificate, absent a showing of notification of subsequent cancellation. Because the policy was previously, not subsequently, cancelled, that is not an issue here.

Farmington also argues that MMS was at fault for failing to indemnify Distel and for incurring legal fees by arguing in the underlying workers compensation action that the employee was an independent contractor. There was evidence that, in one attorney's opinion, MMS's position could not have been made in good faith. However, there was also evidence that the owner of MMS believed the employee was, in fact, an independent contractor. In any event, MMS was apparently never sanctioned for pursuing a frivolous or otherwise inappropriate legal position under MCR 2.114. Holding MMS comparatively at fault for taking an ultimately unsuccessful position in another suit is not "socially and economically desirable." *Lamp*, *supra*.

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[3] The trial court's opinion found breach of Farmington's duty to Distal: "The Court finds that FIA breached its duty to Plaintiff by issuing a Certificate of Insurance when, in fact, there was no coverage in effect. Defendants were negligent in that they failed to follow the rules of the Worker's Compensation Placement Facility, which required FIA to receive authority from the insurer, Wausau, before issuing a Certificate of Deposit."

Farmington argues that it had implied authority from Wausau to issue certificates of insurance. Presuming that to be true, however, authority to issue a certificate is not synonymous with having no duty to exercise care in doing so. Farmington argues that Wausau is comparatively at fault for failing to notify Farmington of the policy cancellation. Wausau apparently sent Farmington notification of the cancellation pursuant to its internal policies, raising the presumption that it was received. *Good v Detroit Automobile Inter-Insurance Exchange*, 67 Mich App 270, 274-276; 241 NW2d 71 (1976). Farmington does not argue that Wausau was at fault for failing to take appropriate steps at that time. Instead, Farmington argues that Wausau should have informed Farmington of the cancellation after Farmington issued the certificate of insurance because Farmington sent a copy of the certificate to Wausau, also pursuant to its internal policies. *Id.* However, by that time, notification of Farmington would have been futile: Farmington could not have notified Distel, and the evidence shows that MMS was "confused" about insurance, so Distel would likely not have received notification from any of the parties. Therefore, Wausau did not contribute to the injury.

III

Finally, Michigan Tooling argues that the trial court should not have allowed Farmington to modify its pleadings, pursuant to MCR 2.118(C)(2). However, we need not reach this issue because any error with regard to the amendment is immaterial in light of our resolution of the issues raised by Farmington on appeal.

Affirmed.

/s/ Stephen L. Borrello
/s/ William B. Murphy
/s/ Janet T. Neff

STATEMENT OF QUESTIONS PRESENTED

ISSUE I

SHOULD MICHIGAN LAW AND POLICY RECOGNIZE THAT AN INSURANCE AGENCY OWES A DUTY OF REASONABLE CARE WITH RESPECT TO THE SUPPLYING OF INSURANCE INFORMATION BY THE INSURED TO UNKNOWN AND UNFORESEEABLE USERS OF THAT INFORMATION?

The Trial Court said "Yes."
The Court of Appeals said "Yes."
The Plaintiff says "Yes."
The Defendant and Third Party Plaintiff-Appellant says "No."
The Third Party Defendant-Appellee says "Yes."

ISSUE II

DID THE TRIAL COURT AND COURT OF APPEALS ERR AS A MATTER OF LAW BY FAILING/REFUSING TO MAKE FINDINGS OF STATUTORILY MANDATED COMPARATIVE FAULT ON THE PART OF THE DEFENDANT MACHINERY MAINTENANCE SERVICES, INC. AND THE THIRD PARTY DEFENDANTS EMPLOYERS INSURANCE OF WAUSAU/WAUSAU INSURANCE COMPANY, AND COMMIT CLEAR ERROR BY FINDING NO COMPARATIVE FAULT ON BEHALF OF THE PLAINTIFF'S SUBROGOR, DISTEL TOOL AND MACHINE, INC.?

The Trial Court said "No."
The Court of Appeals said "No."
Plaintiff says "No."
The Defendant and Third Party Plaintiff-Appellant says "Yes."
The Third Party Defendant-Appellee says "No."

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STANDARDS OF APPELLATE REVIEW

The Defendant and Third Party Plaintiff-Appellant, FIA, appeals the affirmation by the Court of Appeals of both legal rulings and factual determinations made by the Trial Court during a bench trial involving Plaintiff's common law claims of negligence and breach of a third party beneficiary contract, defense theories of statutory comparative fault, and Third Party Plaintiff's claims of common law estoppel. An appeal is also taken from the Court of Appeal's affirmation of legal rulings and factual determinations made by the Trial Court in response to a post-trial motion filed by FIA.

The Michigan appellate courts review *de novo* a Trial Court's Conclusions of Law, including matters of statutory interpretation, while findings of fact in a bench trial are reviewed for clear error. American Alternative Ins Co, Inc v York, 470 Mich 28, 30; 679 NW2d 306 (2004); Federated Publications, Inc v City of Lansing, 467 Mich 98, 106; 649 NW2d 383 (2002); Ambs v Kalamazoo County Road Commission, 255 Mich App 637, 651-652; 662 NW2d 424 (2003); Chapdelaine v Sochocki, 247 Mich App 167, 169; 635 NW2d 339 (2001). The appellate courts will reverse a finding of fact where a review of the entire record of the bench trial leaves the court with a definite and firm conviction that a mistake has been made. Federated Publications, supra.

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STATEMENT OF FACTS

This appeal focuses upon the complicated and often tenuous relationships among several parties, briefly described as follows.

Prior to 1997, the Defendant Farmington Insurance Agency, L.L.C. (hereinafter "FIA"), an independent insurance agency, had a long standing relationship with Arnold Primak and his company, Machinery Maintenance Specialists, Inc. (hereinafter "MMS") regarding the procurement of workers compensation liability insurance (Op. & Order dated 12/13/02, page 2; Tr. 2/22/02, pp 49-50, 122). MMS is a small company specializing in the repair of heavy machinery, often on the premises of other companies (Op. & Order 12/13/02, p 2; Tr. 2/22/02, pp 49, 122). The number of employees and independent contractors hired by MMS varies, and owner Primak occasionally operated MMS without employees (Tr. 8/28/02, p 116).

Over the years, FIA worked closely with Primak in purchasing and maintaining workers compensation liability insurance so that MMS would fulfill its obligation under the Workers' Compensation Disability Act (MCL 418.611). (Tr. 2/22/02, pp 92-93; 4/8/02, pp 40-46, 61). In 1997, FIA repeatedly, but unsuccessfully, attempted to procure private workers compensation insurance coverage for MMS (Tr. 2/22/02, pp 92-93; 4/8/02, pp 40-43). Therefore, FIA recommended and Primak agreed to seek coverage via the Michigan Workers Compensation Placement Facility, an entity created by statute (MCL 500.2301) and comprised of all insurers authorized to write workers compensation liability insurance in Michigan (Tr. 2/22/02, pp 92-93). MMS paid the necessary premiums and secured insurance through Employers Insurance of Wausau/Wausau Insurance Companies ("Wausau") - one insurance company with different business "personas" (Op. & Order 12/13/02, pp 2-3; Tr. 2/22/02, p 40). Wausau policy number 1718-00-072373 was issued effective 9/30/97 to 9/30/98, with copies of the policy sent to MMS and FIA (Op. & Order 12/13/02, p 3; Tr. 2/22/02, p 158).

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Because MMS often repaired equipment on the premises of others, it was necessary to provide its clients with proof of worker's compensation liability insurance (Tr. 2/22/02, p 53). MMS routinely requested, and FIA routinely provided, separate certificates of insurance for MMS to supply to each specific individual clients (Tr. 2/20/02, pp 169-170; 4/8/02, pp 50-51). Since the early 1990s, FIA and various insurers had established a business practice which allowed FIA to directly issue certificates of insurance after FIA reviewed its computer and paper files to verify effective insurance coverage (Tr. 8/28/02, pp 127-130).

On January 26, 1998, Wausau sent a written notice to MMS, via certified mail, warning that policy no. 1718-00-072373 would be canceled on 2/20/98, unless MMS paid overdue premiums and cooperated with an audit of employee numbers and claims (Tr. 2/22/02, 60-62, 144). It is undisputed MMS received the certified letter on January 29, 1998 (Op. & Order 12/13/02, p 3; Tr. 2/22/02, pp 60-62). It is also undisputed that FIA did not receive a copy of the notice purportedly mailed by Wausau (Op. & Order 12/13/02, p 3; Tr. 2/22/02, pp 159-160; 4/8/02, pp 37, 69, 87; 8/28/02, pp 135-136).

On February 23, 1998, Wausau sent MMS a letter canceling its workers compensation liability insurance policy effective 2/20/98 (Op. & Order 12/13/02, p 3; Tr. 2/22/02, pp 77-78, 144). It is undisputed that MMS received this letter (Tr. 2/22/02, pp 7-8). It is also undisputed that FIA never received a copy of the letter of cancellation purportedly mailed by Wausau (Tr. 2/22/02, pp 160-161; 4/8/02, pp 24, 37).

On March 6, 1998, Primak requested FIA to issue a certificate of insurance on the Wausau policy for the benefit of MMS client David Friedman, Inc. (Op. & Order 12/13/02, p 3; Tr. 2/22/02, pp 78-79). At the time he made this request, Primak knew the Wausau policy had already been canceled, but Primak never advised FIA of, or questioned FIA regarding the cancellation (Op. & Order 12/13/02, p 3; Tr. 2/22/02, pp 78, 80-81, 90; 4/8/02, p 24).

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On March 6, 1998, FIA employee Rebecca Steingold reviewed the agency's computer and paper files to verify that the Wausau policy was in effect (Tr. 4/8/02, pp 17-18). Ms. Steingold did not see any evidence of a notice of cancellation or cancellation and, therefore, did not contact Wausau to verify coverage but, instead, directly issued the certificate which reads in pertinent part:

CERTIFICATE OF LIABILITY INSURANCE Date: 03/06/98

PRODUCER

FARMINGTON INS AGENCY/SWALES A
33215 GRAND RIVER
PO BOX 919
FARMINGTON MI 48332-0919

INSURED

MACHINERY MAINTENANCE
SPECIALIST INS
P.O. BOX 67
FLAT ROCK, MI 48134

THIS CERTIFICATE IS ISSUED AS A MATTER OF INFORMATION ONLY AND CONFERS NO RIGHTS UPON THE CERTIFICATE HOLDER. THIS CERTIFICATE DOES NOT AMEND, EXTEND OR ALTER THE COVERAGE AFFORDED BY THE POLICIES BELOW.

* * *

COMPANY

B EMPLOYERS INS OF WAUSAU

* * *

COVERAGES

THIS IS TO CERTIFY THAT THE POLICIES OF INSURANCE LISTED BELOW HAVE BEEN ISSUED TO THE INSURED NAMED ABOVE FOR THE POLICY PERIOD INDICATED, NOTWITHSTANDING ANY REQUIREMENT, TERM OR CONDITION OF ANY CONTRACT OR OTHER DOCUMENT WITH RESPECT TO WHICH THIS CERTIFICATE MAY BE ISSUED OR MAY PERTAIN, THE INSURANCE AFFORDED BY THE POLICIES DESCRIBED HEREIN IS SUBJECT TO ALL THE TERMS, EXCLUSIONS AND CONDITIONS OF SUCH POLICIES. LIMITS SHOWN MAY HAVE BEEN REDUCED BY PAID CLAIMS.

* * *

B **WORKERS COMPENSATION AND EMPLOYERS' LIABILITY**

POLICY NUMBER: 171800072373
POLICY EFFECTIVE DATE: 9/30/97
POLICY EXPIRATION DATE: 9/30/98

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WC STATUTORY LIMITS:

EL EACH ACCIDENT	$100,000
EL DISEASE-POLICY LIMIT	$500,000
EL DISEASE-EA EMPLOYEE	$100,000

* * *

CERTIFICATE HOLDER

DAVID FREEDMAN INC
ATTN: SHARON BIRDWELL
910 S DIX
DETROIT MI 48217

CANCELLATION

SHOULD ANY OF THE ABOVE DESCRIBED POLICIES BE CANCELLED BEFORE THE EXPIRATION DATE THEREOF, THE ISSUING COMPANY WILL ENDEAVOR TO MAIL 10 DAYS WRITTEN NOTICE TO THE CERTIFICATE HOLDER NAMED TO THE LEFT, BUT FAILURE TO MAIL SUCH NOTICE SHALL IMPOSE NO OBLIGATION OR LIABILITY OF ANY KIND UPON THE COMPANY, ITS AGENTS OR REPRESENTATIVES.

AUTHORIZED REPRESENTATIVE

Frank D. Clappison BS A

(Op. & Order 12/13/02, pp 3, 5; Tr. 2/22/02, pp 132, 157, 178-179; 4/8/02, pp 10-11, 14-15, 18, 20, 23, 32, 34, 69-70, 113-114. See also: copy of certificate attached as **Ex. A**)

Ms. Steingold immediately faxed the certificate of insurance to David Friedman, Inc. before making several copies (Tr. 4/8/02, p 15; 8/28/02, p 140). The original certificate was then mailed to David Friedman, Inc. with copies placed in FIA's file and mailed to MMS, Wausau and the Mich. Dept. of Consumer and Industry Services (Tr. 2/22/02, pp 160-161; 4/8/02, p 15; 8/28/02, pp 140-143). FIA utilized the addresses for Wausau and the Dept. of Consumer and Industry Services set forth in the Workers Compensation and Placement Facility Handbook (hereinafter "Facility Handbook", pertinent pages attached as **Ex. B**). (Tr. 8/28/02, pp 124-125)

The express purpose of the Facility Handbook is to assist insurance agents in understanding how the facility operates. (**Ex. B**, Preface, p iii) The Handbook contains a detailed outline regarding

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the respective duties and responsibilities of the employer/insured, insurance agents, and servicing carriers/insurers.[1] (**Ex. B**, pp I-2 - I-3, P-12)

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[1] **DUTIES AND RESPONSIBILITIES IN THE FACILITY**

The Agent's and Agency's Duties and Responsibilities

1. Assist the employer in meeting his obligations under the Michigan Workers' Compensation Law, preferably by securing coverage in the voluntary market. Failing to obtain such coverage, then the agent has the responsibility to assist the employer in obtaining coverage through the Facility in a prompt and efficient manner. Even if coverage must be placed through the Facility, the agent has the continuing responsibility to try to place the coverage in the voluntary market. The agent must explain to the employer the necessity for securing coverage through the Facility.

2. Assist the employer needing coverage through the Facility in completing thoroughly and accurately an application and any other documents that may be required, and in forwarding these promptly to the Michigan Workers' Compensation Placement Facility office.

3. Promptly report to the Servicing Carrier all charges in the employer's name, operations, exposures, locations, financial condition or other changes which may affect the policy or the services being provided. Keep the policy up-to-date by promptly requesting endorsements as required.

4. See that adequate deposit and advance premiums are maintained and encourage the employer to realistically estimate payrolls.

5. Determine what coverages the employer needs for both Michigan and out-of-state operations. Secure such coverages, as available, from the Servicing Carrier or other pools or funds, if necessary.

6. Promptly forward all premium payments received from the employer to the Servicing Carrier to avoid credit cancellations and lapses in coverage. Encourage the employer to meet all premium payments and, if any, finance company obligations in a timely manner.

7. Advise the employer in all matters relating to his workers' compensation insurance. Request information on his behalf, as needed, from the Servicing Carrier or the Facility.

8. Promptly refund any excess producer fees paid you by the Servicing Carrier when requested to do so.

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Important note to the agent: Remember, although you have a very important role in procuring coverage through the Facility, you are not a contract agent or agency of the Servicing Carrier. You have no authority fro the Servicing Carrier to bind or cancel coverage or to otherwise act within such an agency relationship. **Unless a legal finance agreement exists which assigns cancellation or premium refund collection rights to a third party, all premium transactions are strictly between the Servicing Carrier and the employer as a policyholder and you are not a party to that contract.** A servicing carrier may give you certain authority, such as permission to issue certificates of insurance, but such rights are not to be routinely assumed by an agent. Read this handbook carefully and if you still have a question about your authority, contact the Facility or the Servicing Carrier.

The Employer's Duties and Responsibilities

1. Before applying for coverage from the Facility, the employer must, in good faith, be entitled to workers' compensation insurance.

2. Comply with all provisions of the Plan, including accurately and fully completing the required application form and any supporting documents which may be required.

3. Keep the agent fully advised of changes in name or ownership, operations, locations or exposures which may affect coverage, classifications, rates, premium estimates or other aspects of the coverage being provided by the Facility.

4. Cooperate fully with the Servicing Carrier in implementing all reasonable safety recommendations. (Failure to do so may be a valid reason for cancellation, or could result in additional premium charges.)

5. Report all claims promptly and cooperate with the Servicing Carrier in the investigation and settlement of claims.

6. Strictly comply with all terms and conditions of the policy.

The Servicing Carrier's Duties and Responsibilities

Several private insurance companies in Michigan have been designated as Servicing Carriers. As such, these companies write policies in their own name and provide claims, loss control, auditing and other services, just as they would for their voluntarily written policyholders.

1. Provide coverage to all employers who are assigned to the company and who are unable to procure the insurance through ordinary methods.

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When Ms. Steingold directly issued the certificate on 3/6/98, she did so under actual authority from Wausau (Tr. 4/8/02, pp 64, 66-67). While FIA never requested and Wausau never expressly granted FIA written or oral authority to issue certificates of insurance, it is also undisputed that, beginning in 1990, FIA routinely and directly issued 93 certificates regarding at least eight different Wausau Placement Facility policies without Wausau once objecting or instructing FIA to stop the direct issuance of the certificates (Op. & Order 12/13/02, p 13; Tr. 4/8/02, pp 27, 32, 51-55, 67, 83-85, 109, 120-121; 8/28/02, pp 128-132). Hence, FIA possessed actual, albeit implied, authority in full compliance with the Facility Handbook, to issue certificates of insurance on

---

2. Issue the necessary policy and provide underwriting, claims, loss control, auditing and other services in a prompt and efficient manner. Meet the performance standards which have been established for Servicing Carriers in the State of Michigan.

3. Work with and assist the agent, employer and the Facility on problems relating to coverage and service provided under the Plan.

4. Maintain adequate deposits and advance premiums on policies. Refund promptly any excess premiums as determined by final audits. Pay agent's producer fees promptly when due.

5. Make filings with the Department of Consumer & Industry Services and other governmental agencies, as necessary, to provide them with an accurate and current record of coverage.

6. Strictly comply with all terms and conditions of the policy contract.

* * *

CERTIFICATES OF INSURANCE PROCEDURE

certificates of insurance are to be issued by the servicing carrier within 5 working days of receipt of the request.

Often, more immediate issuance is required. If so, the Servicing Carrier should be contacted to see what arrangements can be agreed upon."

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Wausau's policies, including the one issued for MMS on 3/6/98 (Tr. 4/8/02, pp 200, 203-204; 6/19/02, pp 127, 129; 8/28/02, pp 15-17, 21, 57-58, 61-63, 99-100, 104; **Ex. B**, p I-A).

Unbeknownst to either FIA or Wausau, in mid-March of 1998, MMS supplied another client, Distel Tool and Machine Company (hereinafter "Distel Tool") with a photocopy of the certificate previously issued by FIA to David Friedman, Inc., in order to secure a contract with Distel Tool (Op. & Order 12/13/02, pp 4, 8; Tr. 2/22/02, p 156; 4/8/02, pp 38, 59-60; 6/19/02, pp 10, 16). Distel Tool accepted the certificate issued to David Friedman, Inc. as proof of MMS's possession of workers compensation liability insurance without either requesting MMS to obtain a current certificate specifically identifying Distel Tool, or verifying directly with David Friedman, Inc., FIA, or Wausau that the Wausau policy was still in full force and effect (Op. & Order 12/13/02, p 4; Tr. 6/19/02, pp 11-12; 17-19, 22). It is undisputed that, as of April 1, 1998, Distel Tool made no contact or contract with FIA, and indeed these two parties were entirely unknown to each other (Op. & Order 12/13/03, pp 4, 8; Tr. 2/22/02, pp 170-171, 179, 184; 4/8/02, pp 17-18, 36, 59-60; 6/19/02, pp 16-17; 8/28/02, p 151). It is also undisputed that since FIA and Wausau had no knowledge of Distel Tool's existence, let alone Distel Tool's receipt of the 3/6/98 certificate, it would have been impossible for either FIA or Wausau to have contacted Distel Tool to advise of any changes in, or indeed the actual cancellation of, the Wausau workers compensation liability insurance policy (Tr. 2/22/02, pp 165, 168; 4/8/02, pp 72, 213; 8/28/02, pp 59, 150).

On April 1, 1998, MMS employee Tives Staten was injured while working on the Distel Tool premises (Op. & Order 12/13/02, p 3). MMS contacted FIA and requested that it make a claim for workers compensation benefits with Wausau (Tr. 2/22/02, p 184). FIA did so, and on April 6, 1998, was advised for the very first time by Wausau that the MMS policy had been canceled effective 2/20/98 (Tr. 2/22/02, pp 182-185; 4/8/02, p 60).

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Mr. Staten pressed his claims for workers compensation benefits against MMS and Distel Tool (Tr. 6/19/02, pp 29-35). MMS disputed Mr. Staten's claims by arguing that he was an independent contractor and not an employee (6/19/02, pp 45-46). Hence, Distel Tool was also forced to defend Mr. Staten's claims because, if MMS failed to prevail on this defense and Mr. Staten was determined to be an employee of MMS then, pursuant to statute (MCL 418.171(1)), Distel Tool would be deemed Mr. Staten's statutory employer for the purposes of workers compensation benefits since MMS admittedly possessed no workers compensation liability insurance at the time of Mr. Staten's injuries (Tr. 6/19/02, pp 30-45).

The Workers Compensation Disability Board of Appeals affirmed a magistrate's opinion that Tives Staten was an employee of MMS and that Distel Tool was Mr. Staten's statutory employer (Op. & Order 12/13/02, p 4; Tr. 2/22/02, pp 116-117; 6/19/02, pp 34-35, 63). Therefore, Distel Tool's insurer, Michigan Tooling Association Workers Compensation Fund (hereinafter "MTA") was ultimately required to pay on Distel Tool's behalf $130,000 in redeemed workers compensation benefits and $23,502.25 in attorney fees incurred in defending the Staten claims (Op. & Order 12/13/02, p 4; Tr. 6/19/02, pp 34-35, 62-63).

On March 29, 2001, MTA, in its own right, and as the subrogee of Distel Tool, commenced suit against MMS and FIA. Count I of the Complaint seeks damages against MMS under a theory of statutory indemnification citing MCL 418.171(2). Counts II and III seek damages against FIA under theories of breach of a Third Party beneficiary contract and common law negligence, respectively. On May 22, 2001, FIA filed a Third Party Complaint sounding in negligence against Wausau.

The case proceeded to a segmented bench trial (Op. & Order 12/13/02, p 2). The proceedings at trial, not otherwise summarized in the general outline of underlying facts, infra, can be summarized as follows.

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Plaintiff's opening statement outlined his theories of liability against FIA, namely breach of a Third Party beneficiary contract and common law negligence (Tr. 2/22/02, pp 6-18). In its opening statement, MMS acknowledged that MCL 418.171 imposed liability upon Distel Tool as the statutory employer of Tives Staten (Tr. 2/22/02, p 18). In the opening statement, on behalf of FIA, counsel argued that the Plaintiff was not entitled to recover under a Third Party beneficiary theory since there was no evidence of any contract or intended beneficiary (Tr. 2/22/02, p 22). FIA counsel also argued that the agency owed no duty of care under a common law negligence theory to Distel Tool, a non-client, and in any event, FIA complied with the standard of practice for insurance agencies (Tr. 2/22/02, pp 22, 37). Finally, FIA maintained that liability also lay with Distel Tool, Wausau and MMS, with the proofs tending to establish that MMS was 100 percent liable for Plaintiff's damages (Tr. 2/22/02, pp 37-38).

Plaintiff's first witness was Arnold Primak, the owner and president of MMS (Tr. 2/22/02, pp 47, 55). During examination, Mr. Primak made the following significant admissions:

1. He received from Wausau and fully understood both the notice of cancellation and cancellation of the workers compensation liability insurance effective 2/20/98 (Tr. 2/22/02, pp 60-62, 77-78, 83);

2. Certificates of insurance are a regular part of his business and he believed his clients who received the certificates would rely upon them (Tr. 2/22/02, pp 55-67);

3. He loses employment opportunities if he delays providing certificates of insurance to prospective employers (Tr. 2/22/02, p 52); and

4. When he contacted FIA on March 6, 1998 for a certificate of insurance for David Friedman, Inc., he did not advise or question FIA about the fact that his policy with Wausau had already been canceled (Tr. 2/22/02, pp 80-81, 86-87).

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Plaintiff proffered and the Trial Court admitted the Opinion and Order of Magistrate Zettle of the Michigan Department of Consumer Industries Services Bureau of the Workers Disability Compensation Department (Tr. 2/22/02, pp 116-117). This Opinion and Order found that Tives Staten was an employee of MMS when he was injured on 4/1/98 at Distel Tool's premises; and Distel Tool was the statutory employer of Tives Staten for the purposes of workers compensation benefits due to the failure of MMS to possess effective workers compensation liability insurance on the date of Mr. Staten's injury.

Immediately thereafter, and with no objection or arguments on behalf of MMS, the Trial Court granted the directed verdict in favor of Plaintiff on its claims for statutory indemnification for the $130,000 in workers compensation benefits paid to Tives Staten (Tr. 2/22/02, p 118).

Plaintiff called David Clappison as a representative of the Defendant FIA (Tr. 2/22/02, p 120). Mr. Clappison testified that Mr. Primak withheld important information when failing to contact the agency in either January or February of 1998 to inform the agency of the action taken by Wausau to cancel the workers compensation liability policy (Tr. 2/22/02, p 154). According to Mr. Clappison, had Mr. Primak alerted FIA to the threat of and actual cancellation, FIA would not have issued the certificate on 3/6/98 (Tr. 2/22/02, pp 154-155). Mr. Clappison also testified that it was contrary to any accepted industry procedures for Distel Tool to accept and rely upon the certificate previously issued to David Friedman, Inc. (Tr. 2/22/02, pp 157, 169). The witness explained that certificates of insurance are only intended as information for the named holder, and are not intended for any and all clients of the insured (Tr. 2/22/02, p 168). Mr. Clappison explained that agents/insureds can only notify or warn the holders of certificates whose names and addresses are specifically listed on the certificate (Tr. 2/22/02, p 168). Significantly, Mr. Clappison testified that, even if FIA received the 1998 notice of cancellation and cancellation from Wausau, it could not have notified Distel Tool of any changes in coverage because it had no information/records/

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knowledge that Distel had received or relied upon the certificate of insurance issued on 3/6/98 to David Friedman, Inc. (Tr. 2/22/02, p 165). Finally, Mr. Clappison opined that Wausau should have taken additional steps to notify FIA that the policy was canceled after FIA sent Wausau a copy of the 3/6/98 certificate (Tr. 2/22/02, pp 181-182).

Plaintiff also called FIA employee Rebecca Steingold (Tr. 4/8/02, p 5). Ms. Steingold testified that on 3/6/98, she had no reason to believe that the FIA file for MMS was not accurate and complete or that there was any other reason not to issue the certificate of workers compensation liability insurance requested by MMS (Tr. 4/8/02, pp 18-23, 37, 49). Ms. Steingold also testified that the usual 24 to 48 hour time lag before a carrier responds to a confirmation request by an agent could cause an insured to lose employment opportunities (Tr. 4/8/02, pp. 61-62, 84).

Ms. Steingold verified that FIA policies would not have permitted a copy of the certificate issued to David Friedman, Inc. to be sent to Distel Tool (Tr. 4/8/02, pp 18, 36, 57). She also confirmed that FIA only intended, and it would only have been reasonable, for David Friedman, Inc., as the named certificate holder, to rely upon the information contained in the certificate issued on 3/6/98, only (Tr. 4/8/02, pp 19, 57). Continuing, Ms. Steingold verified that even had FIA received notice from Wausau that the certificate issued on 3/6/98 was for a canceled policy, FIA would have immediately sent David Friedman, Inc. a new certificate with the cancellation date; however, it would have been impossible for FIA to send a new certificate to Distel Tool since this party was unknown to FIA (Tr. 4/8/02, p 72). Finally, Ms. Steingold testified that on 3/6/98, she believed she had Wausau's authority to directly issue certificates of insurance based upon past practice, dating back several years, regarding Wausau's Workers Compensation Placement Facility policies, and based upon Wausau's failure to contact FIA and request that the agency stop directly issuing the certificates without first specifically confirming coverage with Wausau (Tr. 4/8/02, pp 51-55, 64, 66-67).

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Plaintiff then called Jodie Skrzychak, a Wausau representative (Tr. 4/8/02, pp 74, 77). Ms. Skrzychak admitted that the Michigan Workers Compensation Placement Facility Handbook does not require carriers to issue written authorizations before an agent can issue certificates of insurance (Tr. 4/8/02, pp 92-93). The Wausau representative also admitted that as of 2001, Wausau had not objected to and/or instructed FIA to cease the direct issuing of certificates of insurance (Tr. 4/8/02, pp 120-121). Moreover, Ms. Skrzychak readily admitted that the official Wausau file on MMS was incomplete, lacking copies of many essential documents such as letters, notices, etc., regarding the MMS policy (Tr. 4/8/02, pp 96, 107, 121-122). Finally, the Wausau representative conceded that Wausau had no definitive proof that FIA's copy of the notice of cancellation was sent to the correct address and thus received by FIA (Tr. 4/8/02, p 123).

As its expert witness, Plaintiff called Lawrence Polac (Tr. 4/8/02, p 41). Mr. Polac made several key admissions that supported the Defendant FIA's position at trial. First, Mr. Polac testified that it was unreasonable for Arnold Primak to request FIA to issue the certificate of insurance on 3/6/98 since Mr. Primak knew of the February cancellation and knew he had not paid the requisite premiums (Tr. 4/8/02, pp 177-178, 183). Indeed, according to Plaintiff's own expert, the "blame" for Plaintiff's damages rested exclusively with Arnold Primak (Tr. 4/8/02, pp 184, 187-188). Specifically, Mr. Polac testified that had Arnold Primak never asked for the certificate on 3/6/98, neither FIA or Wausau would have been sued (Tr. 4/8/02, pp 184, 187-188).

With respect to Distel Tool's conduct, Mr. Polac conceded that it was unreasonable for this party to rely in April upon the certificate of insurance issued in March to David Friedman, Inc., because, had the coverage changed after 3/6/98, it would have been impossible for either Wausau or FIA to notify Distel Tool, a recipient unknown to them (Tr. 4/8/02, pp 173, 176, 213). In this regard, Mr. Polac testified that it would have been "simple" for Distel Tool to ask FIA for a certificate issued directly to Distel Tool (Tr. 4/8/02, p 177).

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With respect to the theory that FIA violated the Facility Handbook by failing to get express authorization from Wausau to issue the certificate on 3/6/98, Mr. Polac conceded that:

1. The Handbook did not require written authority before an agent could act on behalf of the carrier;

2. Authority can be implied via a course of conduct or method of practice over time;

3. Verbal confirmation of coverage by the carrier to the agent is neither a necessary nor actual practice;

4. It is incumbent upon the insurer/carrier to "correct" implied authority by objecting or instructing the agent to stop direct issuance of the certificate; and

5. Implied actual authority "supersedes" any Handbook rules or regulations. (Tr. 4/8/02, pp 199-204, 210).

Finally, Mr. Polac conceded that the evidence demonstrated a copy of the 3/6/98 certificate had been mailed to Wausau by FIA (Tr. 4/8/02, p 212).

Plaintiff called Richard Distel, the president and manager of Distel Tool (Tr. 6/19/02, p 9). Significantly, Mr. Distel admitted that in April of 1998, he fully understood that the certificate of insurance provided to him by MMS did not represent and could not guarantee that MMS had workers compensation liability in effect after 3/6/98 (Tr. 6/19/02, pp 14-16). Additionally, Mr. Distel confirmed that with respect to the certificate, he did not speak or deal with anyone at FIA, and indeed, had no prior relationship with FIA (Tr. 6/19/02, pp 16-17). Finally, Mr. Distel admitted that he never contacted anyone at David Friedman, Inc., FIA or Wausau to inquire whether the 3/6/98 certificate was still valid, and did not request Mr. Primak or MMS to obtain a certificate issued specifically to Distel Tool (Tr. 6/19/02, pp 18-19, 22).

At the close of Plaintiff's proofs, FIA moved for a directed verdict, arguing that as a matter of undisputed fact, Distel Tool was not the intended Third Party beneficiary of any contract and, as

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a matter of law, FIA did not owe a duty of care to Plaintiff (Tr. 6/19/02, pp 73-78). The Trial Court took the Defendant's Motion under advisement (Tr. 6/19/02, p 94).

For its first witness, FIA called William Brunett, an expert in the field of insurance agency (Tr. 6/19/02, pp 95, 96, 101). First, Mr. Brunett opined that FIA was entitled to rely upon the honesty of its insured, Arnold Primak, and that Mr. Primak "had no right" to request the 3/6/98 certificate when Primak knew that the insurance policy had previously been canceled (Tr. 6/19/02, p 120; 8/28/02, p 64). Secondly, Mr. Brunett firmly opined that FIA had implied consent, "and therefore actual authority" from Wausau to issue certificates of insurance because Wausau routinely accepted 93 certificates from FIA over an eight year period, without objecting or demanding FIA to stop the practice (Tr. 6/19/02, pp 123-124, 127; 8/28/02, pp 57-58, 60-68). According to Mr. Brunett, since FIA had actual authority on 3/6/98, the standard of practice did not require the agency to call and specifically verify coverage with Wausau before issuing the certificates (Tr. 6/19/02, p 123, 129). Here, Mr. Brunett emphasized that, while the Placement Handbook indicated that insurers must give authority to agents to issue certificates, the Handbook does not require authority to be in writing (Tr. 8/28/02, p 10). Hence, Mr. Brunett was of the opinion that under the circumstances, FIA did not exceed its authority because it had implied consent from Wausau (Tr. 8/28/02, pp 15-17, 21). Finally, Mr. Brunett opined that Distel Tool was not entitled to rely upon the 3/6/98 certificate because it was specifically issued to another (Tr. 6/19/02, p 131; 8/28/02, pp 23, 27).

FIA's second insurance agency expert, David Walker, agreed with Brunett's opinions regarding the existence of actual authority on the part of FIA to directly issue the certificate of insurance on 3/6/98 on the Wausau policy issued to MMS (Tr. 8/28/02, pp 99, 100, 106, 115).

FIA's final witness was FIA officer and licensed insurance agent, David Clappison (Tr. 8/28/02, pp 122-126). Mr. Clappison confirmed that FIA had actual authority from Wausau to issue certificates of workers compensation liability insurance based upon an eight year history of direct

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issuance by FIA without any objection or counter instruction by Wausau (Tr. 8/28/02, pp 130-133). Mr. Clappison also reiterated that, had FIA timely received from Wausau copies of the notice of cancellation and cancellation letter, FIA would not have issued the certificate on 3/6/98 (Tr. 6/19/02, pp 135-136). Mr. Clappison reaffirmed that Arnold Primak should not have requested the certificate since he had knowledge his insurance policy had already been canceled (Tr. 6/19/02, pp 145-146). Finally, Mr. Clappison confirmed that, even had Wausau properly notified FIA after 3/6/98 of the cancellation, neither FIA nor Wausau had any way of knowing Distel Tool was holding a false certificate (Tr. 6/19/02, p 150). Here, Mr. Clappison reiterated that FIA was not aware of Mr. Primak's relationship with Distel Tool under after Mr. Staten's injury (Tr. 6/19/02, p 151).

Wausau called no witnesses and submitted no proofs.

On December 13, 2002, the Trial Court issued an Opinion and Order setting forth Findings of Fact and Conclusions of Law. Specifically, the Trial Court:

1. Confirmed the directed verdict in favor of Plaintiff and against MMS for $130,000, paid on behalf of Distel Tool as the statutory employer of MMS's employee, Tives Staten;

2. Determined that Plaintiff had failed to prove the necessary elements of a breach of a Third Party beneficiary contract because the undisputed evidence established FIA and Distel Tool had no contract, contact or even knowledge of one another on 3/6/98; the certificate of 3/6/98 does not even name Distel Tool; and, therefore, FIA took no action on 3/6/98 which could be construed as intended for the direct benefit of Distel Tool;

3. Found FIA owed a duty of care under a common law negligence theory to Plaintiff's subrogor, Distel Tool, and violated that duty by failing, as required by the Facility Handbook, to request Wausau to issue the certificate of insurance to David Friedman, Inc. on 3/6/98, and instead, issuing a certificate containing false information which was ultimately and reasonably relied upon by Distel Tool;

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4. Determine that Wausau was not at fault for any of the damages incurred by Plaintiff as a result of Distel Tool being deemed the statutory employer of an MMS employee.

(Op. & Order 12/13/02, pp 7-13)

On February 5, 2003, the Trial Court entered a Judgment incorporating its Opinion and Order of 12/13/02.

FIA filed a timely Motion to Amend the Findings of Fact an Conclusions of Law, and specifically requested the Trial Court to:

1. Reconsider its imposition of a newly created duty of care upon FIA in favor of Distel Tool;

2. Reconsider its determination of no comparative fault on the part of Wausau for Plaintiff's damages; and,

3. Make express determinations regarding the comparative fault attributable to MMS and Distel Tool, as mandated by the comparative fault statutes, MCL 600.2957; MCL 600.2959; MCL 600.6304.

Without permitting oral argument on FIA's post-judgment motion, and without providing any reasoning or explanation whatsoever, on March 6, 2003, the Trial Court summarily refused to provide any relief from or make any corrections to the Opinion and Order of 12/13/02 as reduced to Judgment on 2/5/03.

A Corrected Final Judgment in the amount of $153,502.85, incorporating the inadvertent omission of the Third Party Defendant, Wausau Insurance Companies and the inadvertent omission of the disposition of the Third Party Claim, was entered by the Trial Court on May 28, 2003.

FIA filed a timely appeal of right from the final orders of the Circuit Court.

On December 7, 2004, the Court of Appeals issued its Opinion affirming the Judgment against FIA in all respects. The Defendant and Third Party Plaintiff FIA now submits its application pursuant to MCR 7.302 seeking relief from this Supreme Court.

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ARGUMENT I:

MICHIGAN LAW AND POLICY SHOULD NOT RECOGNIZE THAT AN INSURANCE AGENCY OWES A DUTY OF REASONABLE CARE WITH RESPECT TO THE SUPPLYING OF INSURANCE INFORMATION BY THE INSURED TO UNKNOWN AND UNFORESEEABLE USERS OF THAT INFORMATION.

Plaintiff proceeded to trial under a theory that, as the insurance agent for an employer/ insured, the Defendant FIA owed a duty of care to any third party who received from the insured and relied upon information set forth in a certificate regarding workers compensation insurance issued by FIA. The Trial Court determined, as a matter of first impression, that such a duty exists under Michigan law (Op. & Order 12/13/02, pp 10-11). The Court of Appeals affirmed, finding that, based on the record, Distel Tool was "entitled" to rely upon the certificate of insurance issued to David Freeman on March 6, 1998, as proof that MMS possessed effective workers compensation liability insurance on April 1, 1998. The court below justified its creation of a duty of care upon insurance agents in favor of unknown third party recipients of certificates of insurance on the basis that:

1. The issue of duty hinges exclusively upon whether the harm to the third party was foreseeable;

2. As a potential customer of MMS, Distel Tool was clearly in a class of foreseeable parties who were "entitled" to rely upon the certificates of insurance as accurate proof; and

3. Distel Tool was "entitled" to rely upon a certificate of insurance issued on March 6, 1998 to a different party as proof that, thereafter, MMS had effective workers compensation insurance coverage.

Unfortunately, the Court of Appeals holding is the product of improper reasoning and the inexplicable disregard of existing controlling and persuasive authority regarding the proper scope of liability to be imposed upon insurance agents in favor of third parties.

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To establish a *prima facie* case of negligence, a plaintiff must establish all of the following elements: a duty owed by the defendant; a breach of that duty; causation; and, damages. Schultz v Consumers Power Co, 443 Mich 445, 449; 506 NW2d 175 (1993); Krass v Tri-County Security, Inc, 233 Mich App 661, 667-668; 593 NW2d 578 (1999); Pitsch v ESC Michigan, Inc, 233 Mich App 578, 597; 593 NW2d 565 (1999), lv den, 459 Mich 990; 595 NW2d 844 (1989); Malik v William Beaumont Hosp, 168 Mich App 159, 168; 423 NW2d 920 (1988). Duty is a question of law for the courts to determine. Dyer v Trachtman, 470 Mich 45, 49; 679 NW2d 311 (2004); Valcaniant v Detroit Edison Co, 470 Mich 82, 86; 679 NW2d 689 (2004); Murdock v Higgins, 454 Mich 46, 53; 559 NW2d 639 (1997).

The concept of "duty" is not sacrosanct in itself, but rather, it is an expression of the total policy considerations which prompt the law to impose upon one party an obligation to act for the benefit of another party. Maiden v Rozwood, 461 Mich 109, 131-132; 597 NW2d 817 (1999); Friedman v Dozorc, 412 Mich 1, 22; 312 NW2d 585 (1981); Graves v Warner Bros, 253 Mich App 486, 492; 656 NW2d 195 (2002), lv den (7/13/03); Krass, supra, at 669. Factors that the courts examine when deliberating upon whether to impose a duty include: foreseeability of harm; evidence of a direct contractual or other relationship between the parties involved; the degree of certainty of injuries; closeness of the connection between the conduct and the injury; the ability of the party to control the situation and/or avoid the injuries; moral blame attached to the conduct; furtherance of a policy of preventing future harm; AND, the burdens and consequences of imposing liability for any breach of a duty of care. Dyer, supra; Valcaniant, supra; Buczkowski v McKay, 441 Mich 96, 100-101; 409 NW2d 330 (1992); Williams v Cunningham Drugs, 429 Mich 495, 502; 418 NW2d 381 (1988); Graves, supra, at 592-593; Krass, supra at 668-669.

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Significantly, even where a Plaintiff's injuries are foreseeable, this Court has mandated that consideration must still be given to other recognized variables that might mitigate against the imposition of a legal duty. Valcaniant, supra at 86-88; Buczowski, supra at 102.

Essentially, the Michigan Courts have historically imposed a duty only where the relationship between a party and the injured person is sufficiently strong to justify the imposition of a legal obligation on the party for the benefit of the injured person. Dyer, supra; Valcaniant, supra; Groncki v Detroit Edison, 453 Mich 644, 666-667; 557 NW2d 219 (1996); Schultz, supra, at 540; Friedman, supra; Krass, supra, at 669; Malik, supra. The Michigan courts do not cavalierly impose duties of care in every situation where there might be some foreseeable harm arising out of an actor's conduct: social policy and common sense will intervene at a reasonable point to limit the liability for the consequences of even negligent acts. Dyer, supra; Groncki, supra, at 661; Buczkowski, supra; Friedman, supra; Malik, supra, at 167.

In the absence of a special relationship, Michigan law has steadfastly refused to impose a legal duty that obligates one person to aid or protect third parties. Williams v Cunningham Drugs, supra, at 498-499; Graves, supra, at 493; Krass, supra, at 668; Malik, supra. Specifically, the Michigan Courts ordinarily limit a licensed professional's duty of care to the person who has contracted for the professional services and who, because of the professional-client relationship, justifiably relies upon these professional's judgment and actions. Williams v Polgar, 391 Mich 6, 21-22; 215 NW2d 149 (1974); Marble Cleary Trust v Edward-Marlah Muzyl Trust, 262 Mich App 485, 502; 686 NW2d 770 (2004). Stockler v Rose, 174 Mich App 14, 32; 436 NW2d 70 (1989) (lv den); Malik, supra, at 168-169; Rogers v Horvath, 65 Mich App 644, 646-647; 237 NW2d 595 (1975), lv den, 396 Mich 845 (1976). Hence, a professional will be held liable to third parties for

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damages caused by negligent performance of professional obligations only where the third party justifiably relies upon the professional services to another, and either:

1. The professional directly supplies the information/services to the third party, or knows/foresees the actual recipient intends to supply the service/information to the third party; or,

2. The professional intends for the third party to rely upon the services/information or knows that the actual recipient intends to induce such reliance on the part of the third party. Friedman, supra, at 28-37; Williams v Polgar, supra; Stockler, supra at 35-37; Pitsch, supra.

In Williams v Polgar, supra, this Court took pains to expressly restrict its holding to recognizing a limited cause of action for negligent misrepresentations for injured third party land buyers with respect to an abstractor's negligent performance of contractual duties owed to a land seller regarding a title search issued for the benefit of the seller and buyer. Id.

In Stockler, the issue before the Court of Appeals was a business seller's accountant owed a duty of care to the business buyer, where the accountant knew the buyer would rely upon the audit/financial statements prepared on behalf of the seller. Id. The Stockler Court framed the issue before it as one of first impression: namely the scope of a professional's third party liability for the negligent supply of information. Id. at 34. The Court of Appeals adopted the standards set forth in the Restatement Torts 2d, §552[2] because it offered a restrictive approach taking into special

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[2] (1) One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transaction, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

(2) Except as stated in Subsection (3), the liability stated in Subsection (1) is limited to loss suffered

(a) by the person or one of a limited group of persons for whose benefits and guidance he

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consideration the alleged negligent misrepresenter's knowledge regarding the identity of the recipient, the intention of the recipient to rely upon the information, and the misrepresenter's ability to control dissemination and correction of the information. Id. at 36-37.

Again, Michigan has yet to directly confront the issue of an insurance agent's third party liability for negligence or negligent misrepresentation in the context of the issuance of certificates of insurance. However, the consensus among sister jurisdictions is that no such duty may be imposed under the Restatement of Torts 2d, §552. See: Quigley v Bay State Graphics, Inc, 693 NE2d 1368, 1371; 427 Mass 455 (Mass. S. Ct. 1998) [owners of a commercial building, along with the holder of a security interest in the equipment used by the building tenant, not permitted to sue the insurance agency through which the tenant had purchased property insurance under theory that the agency had negligently misrepresented that the owner and security interest holder were loss payees under the policy because: other than transmission of the certificate of insurance, there was no direct contact or communication between the insurance agent and the owner or security interest holder; the agent had no knowledge of any security interests in the insured property or that the specific plaintiffs would rely upon the certificate as confirming that the tenant has procured insurance to cover their interest; and/or the plaintiffs could not prove justifiable reliance since the certificate only identified the tenant as an insured and plainly stated that the

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intends to supply the information or knows that the recipient intends to supply it; and

(b) through reliance upon it in a transaction that he intends the information to influence or knows that the recipient so intends or in a substantially similar transaction.

(3) The liability of one who is under a public duty to give the information extends to loss suffered by any of the class of persons for whose benefit the duty is created, in any of the transactions in which it is intended to protect them.

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certificate conferred no rights upon the certificate holder.] Lu-An-Do, Inc v Kloots, 721 NE2d 507, 509-514; 131 Ohio App 3d 71 (1999) [restaurant seller who retained a security interest in damaged restaurant contents not allowed to sue an insurance agency under a negligence theory because, as a matter of law, an insurance agent owes no duty to a non-client where there is no oral or written agreement between the party and the agent, and where the party never contacted the agent about coverage, and seller could not proceed under a theory of negligent misrepresentation because the property seller's reliance upon the certificate of insurance as proof of an insurable interest in the building contents was neither specifically foreseen by the agent, nor justifiable on its face since the plain language of the certificate put the seller on notice that it had no rights under the certificate.] Seal v Hart, 50 P 3d 520, 522-524, 528-530; 310 Mont 307 (Mont S. Ct. 2002) [seller of saddles brought a negligence action against the buyer's insurance agent for losses arising out of the theft of the merchandise, dismissed because, as a matter of law, seller could not rely upon a certificate of insurance to create a duty of care since the certificate did not constitute a contract to procure insurance, or otherwise create a duty upon the insurance agent to procure insurance. Significantly, the Seal Court limited its review to the Plaintiff's pled theory of negligence, since the Plaintiff had failed to allege a separate theory of negligent misrepresentation.] Also in accord: Prudential Securities, Inc v E-Net, Inc, 780 A2d 359; 140 Md App 194 (2001) [stock transfer agent that mistakenly issued certificates without restriction against transfer was not susceptible to either negligence or negligent misrepresentation claims because the broker had no contact with the stock agent and the agent did not actually foresee that the broker would specifically use or rely upon the information set forth in the certificate].

When the controlling and persuasive law is applied to the undisputed facts established during the bench trial in this matter, the only available conclusion is that the Trial Court and

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Court of Appeals erred as a matter of law by allowing Plaintiff to proceed under a negligence theory against the Defendant FIA.

Again, in this case, MMS was the employer/insured, FIA was the insurance agent, and Wausau was the servicing carrier that provide MMS with workers' compensation liability through the Michigan Workers' Compensation Facility (hereinafter "Facility"). The Facility is an entity created by statute [MCL 500.2301] and is comprised of all insurers authorized to write workers compensation insurance in Michigan. The purpose of the Facility is to: (1) provide workers compensation insurance to any person who is unable to procure insurance through ordinary methods; and, (2) preserve to the public the benefits of price competition by encouraging maximum use of the private insurance system. MCL 500.2301; Michigan Assoc of Ins Agents v Michigan Workers Comp Placement Facility, 220 Mich App 128, 129-130; 559 NW2d 52 (1997). Insurance agents receive their commissions from the Facility when assisting a client in obtaining insurance through the facility. MCL 500.2322; Michigan Association of Insurance Agents, supra, at 130.

The Facility Handbook offers specific guidelines to insurance agents regarding the assistance the agent should offer the employer/insured in obtaining and then complying with the terms of worker's compensation liability insurance issued through the Facility (**Ex. B**). While the Handbook cautions the agent not to assume the authority to act on behalf of a servicing carrier, the Handbook also expressly permits the carrier to extend authority such as, specifically, permitting agents to issue certificates of insurance (**Ex. B**).

On March 6, 1998, and at the request of MMS, FIA issued a Certificate of Insurance showing David Friedman, Inc. as the certificate holder and Wausau policy no. 1718-00-072373, as MMS's workers' compensation liability insurance, effective from 9/30/97 to 9/30/98.

It is undisputed that on 3/6/98, FIA correctly believed it had actual authority to issue the certificate of insurance on behalf of Wausau in accordance with the custom, usage and

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procedures in the insurance business, in general, and, in particular, in accordance with the Facility Handbook, as a result of Wausau's ratification of this implied authority over an eight year period involving FIA's issuance of over 90 certificates of insurance (Tr. 4/8/02, pp 64, 66-67, 200, 203-204; 6/19/02, pp 127, 129; 8/28/02, pp 15-17, 21, 51-58, 61-63, 99-100, 104).

It is also undisputed that due to the failure of Wausau to send and/or FIA to receive copies of a Notice of Cancellation and Cancellation of the policy issued to MMS, FIA had absolutely no knowledge on 3/6/98 that Wausau had canceled policy no. 1718-00-072373 effective 2/20/98 (Tr. 2/22/02, pp 159-160; 4/8/02, pp 37, 69, 87; 8/28/02, pp 135-136). Moreover, it is undisputed that MMS had full knowledge of the cancellation of the policy and yet did not advise FIA of or inquire as to the effect of the cancellation when making the request for a certificate of insurance on 3/6/98 (Op. & Order 12/13/02, p 3; Tr. 2/22/02, pp 80-81, 90; 4/8/02, p 24).

Finally, it is undisputed that, unbeknownst to FIA and Wausau, in mid-March, MMS supplied a copy of the certificate issued on 3/6/98 to a prospective customer, Distel Tool. (Op. & Order 12/13/02, pp 4, 8; Tr. 2/22/02, p 156; 4/8/02, pp 38, 59-60; 6/19/02, pp 10, 16).

On April 1, 1998, Tives Staten, an employee of MMS was injured while repairing equipment on the Distel Tool premises. (Op. & Order 12/13/02, p 3). Because MMS did not possess effective workers' compensation liability insurance on the date of the injury, pursuant to MCL 418.171, Distel Tool was deemed Mr. Staten's statutory employer for the purposes of workers' compensation. (Op. & Order 12/13/02, p 4; Tr. 2/22/02, pp 116-117; 6/19/02, pp 34-35, 63) Ultimately, Distel Tool's workers' compensation liability insurer, Plaintiff MTA, paid $130,000 in benefits to Mr. Staten and $23,502.85 in legal fees to resolve the Staten claim. (Opinion and Order 12/13/03, p 4; Tr. 6/19/02, pp 34-35, 62-63)

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The threshold issue presented is whether MTA is now permitted to press subrogation claims to recover the $153,502.85 from FIA under a common law negligence theory - the only negligence theory pled and pursued at trial. The Trial Court and Court of Appeals permitted MTA to recover, reasoning that, pursuant to the Workers' Compensation Act and the Facility Handbook, FIA had an "indirect" relationship with Distel Tool and that Distel Tool was a foreseeable recipient of a certificate of insurance issued by FIA. (Op & Order 12/13/02, pp 10-11) However, this analysis and ultimate determination that FIA owed a duty of care under a common law negligence theory is fraught with error.

At the outset, the Trial Court improperly relied solely upon the Workers' Compensation Statutes or Placement Facility Handbook, when creating a duty of care in favor of Plaintiff: as a matter of law, any evidence that FIA may have violated statutes or an administrative handbook was, at best, merely evidence that the Defendant agent breached a duty of care and was irrelevant to the issue of whether a duty of care existed in the first place. Groncki, supra, at 658, fn 6; Schultz, supra, at 456. In any event, when the proper and required analysis is utilized, a common law negligence theory as pled in this matter was not available to Distel Tool, nor its subrogee, MTA.

First, it is undisputed that FIA did not directly supply the certificate to Distel Tool and did not know that Distel Tool intended to rely upon the certificate as proof of effective insurance coverage after 3/6/98. As both the Trial Court and Court of Appeals recognized, FIA and Distel Tool were entirely unknown to each other until after the Staten injury. (Op. & Order 12/13/02, pp 4, 8; Tr. 2/22/02, pp 170-171, 179, 184; 4/8/02, pp 17-18, 36, 59-60; 6/19/02, pp 16-17; 8/28/02, p 151)

Additionally, the Distel Tool representative provided unrebutted testimony that MMS - and not FIA - provided Distel Tool with the certificate. (Op. & Order 12/13/02, pp 4, 8; Tr. 2/22/02, p 156; 4/18/02, pp 38, 59-60; 6/19/02, pp 10, 16) Moreover, the evidence definitely established that

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there was no contact or contract whatsoever at any time between FIA and Distel Tool regarding the effective dates of a workers' compensation liability insurance policy previously issued by Wausau to MMS, in general, and with respect to any certificate of insurance issued by FIA, in particular. (Op. & Order 12/13/02, pp 4, 8; Tr. 2/22/02, pp 170-171, 179, 184; 4/8/02, pp 17-18, 36, 59-60; 6/19/02, pp 16-17; 8/28/02, p 151) Significantly, the record established that neither FIA nor Wausau had any knowledge that the certificate of insurance had been supplied to Distel Tool or that Distel Tool intended to rely upon it. (Tr. 2/22/02, pp 165, 168; 4/8/02, pp 72, 213; 8/28/02, pp 59, 150) These very facts prompted the Trial Court and Court of Appeals to conclude that Wausau could not have reasonably foreseen that the unknown Third Party recipient Distel Tool might have relied upon the certificate and, as a result, allowed MMS employees on its premises.

It simply defies all reason, as well as established case law precedent, to conclude that, unlike Wausau, FIA should have foreseen that the same unknown Third Party intended to rely upon the same certificate! Groncki, supra; Schultz, supra; Friedman, supra; Krass, supra; Malik, supra.

Secondly, Plaintiff absolutely failed to establish either that FIA intended unknown third party recipients such as Distel Tool to rely upon the certificate issued on 3/6/98 to David Friedman, Inc., as proof of insurance after 3/6/98, or that FIA knew the actual recipient, MMS, intended to induce such reliance on the part of Distel Tool. Rather, the two FIA representatives steadfastly testified that:

(1) FIA intended for David Friedman, Inc., only to rely upon the certificate as information, only, as to the effective coverage as of 3/6/98, only;

(2) FIA did not know that MMS had provided a copy of the certificate to Distel Tool after 3/6/98 for the purposes of inducing Distel Tool to rely upon the certificate as proof of insurance; and,

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(3) FIA had no reason to even suspect MMS might supply an unknown, unnamed Third Party with a copy of the certificate previously issued to another Third Party because FIA had always previously issued certificates for MMS to only specifically named MMS customers with each job/customer receiving its own separate certificate. (Tr. 2/22/02, pp 168-171, 179, 184-186; 4/8/02, pp 17-19, 36, 57, 59, 72).

The bottom line is that, given the total absence of any direct or special relationship between Distel Tool and FIA, the Trial Court and Court of Appeals should have readily concluded that FIA owed no duty of care to Distel Tool so as to allow Michigan Tooling, as subrogee of Distel Tool, to proceed under a common law theory of negligence - the only negligence theory pled in this case. Dyer, supra; Valcaniant, supra; Groncki, supra; Schultz, supra; Friedman, supra; Krass, supra; Williams v Cunningham, supra; Pitsch, supra; Graves, supra; Commercial Union Ins Co v Medical Protective Co, 426 Mich 109; 393 NW2d 479 (1986); [subrogee acquires no greater rights than subrogor]; Federal Kemper Ins Co v Isaacson, 145 Mich App 179; 397 NW2d 379 (1985) [subrogee subject to defenses available against subrogor].

The Defendant FIA also submits that no further analysis under a separate theory of negligent misrepresentation is warranted because Plaintiff undeniably failed to plead, let alone prove, the elements of such a theory. Seal, supra. However, even if it is assumed, for the purposes of argument only, that the Plaintiff pled the elements of a negligent misrepresentation theory, the unavoidable conclusion is that, as a matter of law, the Defendant FIA still did not owe a duty of care to Plaintiff's subrogor, Distel Tool. For, Plaintiff absolutely failed to demonstrate a knowingly false or recklessly made statement by FIA and that Distel Tool's reliance on the statement, namely the Certificate of Insurance, was both specifically foreseen by FIA and justifiable on its face.

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Specifically, the testimony at trial established, at worse, an innocent misrepresentation on the part of FIA regarding the incorrect dates of effective insurance coverage. (Tr. 4/8/02, pp 18-23, 37, 49) In any event, even if a false or reckless statement could be attributed to FIA, Plaintiff's theory of negligent misrepresentation would still fail: again, it is undisputed that FIA did not have actual knowledge that Distel Tool, specifically, would later rely upon the certificate of insurance issued on 3/6/98 to David Friedman, Inc. as proof that MMS possessed workers' compensation liability coverage effective April 1, 1998, nor did FIA intend to induce such reliance on the part of Distel Tool!

Most significantly, the nature and plain language of the certificate belied any reliance, justified or otherwise, by Distel Tool on the certificate as proof positive that MMS had workers' compensation liability insurance in effect on April 1, 1998, the day of the injury to MMS employee Staten on Distel Tool's premises:

> THIS CERTIFICATE IS ISSUED AS A MATTER OF INFORMATION ONLY AND CONFERS NO RIGHTS UPON THE CERTIFICATE HOLDER. THIS CERTIFICATE DOES NOT AMEND, EXTEND OR ALTER THE COVERAGE AFFORDED BY THE POLICIES BELOW.

Any certificate of insurance is generally considered only evidence that coverage is in effect on the date of issuance and confers no rights upon the holder. See: Seal, supra at 529 citing 13A Appleman, Insurance Law and Practice §7530. See also: Auto Owners Ins Co v Michigan Mut Ins Co, 223 Mich App 205, 215-216; 565 NW2d 907 (1997). In this case, the certificate of insurance issued by FIA on 3/6/98 was merely evidence given to David Friedman, Inc., only, that MMS had effective workers' compensation liability insurance on 3/6/98, only. It certainly did not and could never have served as proof for Distel Tool that MMS had effective workers' compensation liability insurance effective as of 4/1/98! Indeed, since, by its very terms, the certificate conferred no rights upon the identified certificate holder, David Friedman, Inc., it certainly conferred no rights,

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whatsoever, upon Distel Tool as an unidentified recipient! Rather, the plain language of the certificate clearly limits reliability to the identified certificate holder, and then warns the identified certificate holder that the data regarding insurance coverage is supplied as information only! This very fact has compelled other jurisdictions to hold that §552 of the Restatement 2d, Torts does not permit an identified holder of a certificate of insurance to recover against issuing insurance agent under a theory of negligent misrepresentation. Certainly then, the Restatement would not allow an unidentified holder and unintended recipient to proceed against an insurance agent! Quigley, supra; Lu-An-Da, Inc, supra.

The Trial Court and Court of Appeals justified their imposition of liability by reasoning that FIA should have foreseen Distel Tool's reliance upon the certificate of insurance due to Distel Tool's membership in a general class of possible third party recipients of certificates of insurance without any analysis whatsoever regarding whether the reliance on the part of Distel Tool was reasonable and justified. The lower courts' reasoning and/or lack of analysis is absolutely untenable! Again, the Restatement of Torts section, §552, as correctly adopted in Michigan, only permits the imposition of a duty of care where the third party is a member of an identifiable and limited class, and where the third party's justified reliance is specifically foreseen by the agent. Williams, supra; Stockler, supra. See also: Quigley, supra; Lu-An-Do, Inc, supra; Prudential Securities, Inc., supra.

The record below certainly foreclosed liability under the Restatement test. Specifically, the testimony of both FIA and Wausau representatives, as corroborated by credible expert opinion, is that it is an unacceptable practice for a certificate issued to one holder to be supplied to another, unnamed entity, or for blank certificates to be issued and disseminated at the insured's convenience. (Tr. 2/22/02, pp 167-168; 4/8/02, pp 18, 36, 57; 6/19/02, pp 130-133). Additionally, the defense experts uniformly testified that it is unreasonable for an unnamed third party to rely on a certificate issued previously to a named party. (Tr. 6/19/02, pp 132-133; 8/28/02, p 98) Even Plaintiff's expert

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conceded that it is unreasonable for a third party holder of a certificate unknown to the insurance agent to rely upon the insurance agent to verify insurance information set forth in the certificate! (Tr. 4/18/02, pp 173, 176)

Finally, as a matter of law and policy, the express language of the certificate absolutely forecloses reliance by a named holder on the information as proof of insurance at any time, and certainly not beyond the date of issuance. Quigley, supra; Lu-An-Do, Inc, supra; Seal, supra; Prudential Securities, supra. It simply defies all reason and common sense to conclude that an unnamed recipient is permitted to justifiably rely upon the certificate as proof of insurance after the date it was issued! Absent justifiable reliance, Plaintiff's theory of negligent misrepresentation fails as a matter of existing and valid law. Williams v Polgar, supra; Friedman, supra; Marble Cleary Trust, supra; Stockler, supra; Malik, supra; Pitsch, supra; Rogers, supra.

Nor should Michigan jurisprudence tolerate the creation by the Trial Court and Court of Appeals of a new duty of care upon a professional in favor of a potentially vast and otherwise undeterminable number of non-clients under a theory of either negligence or negligent misrepresentation.

Certainly, the Court of Appeals clearly erred by limiting its analysis of the threshold issue of duty to the fact of foreseeability of the third party injury, alone: this Court has repeatedly mandated, and indeed has recently reaffirmed that, while foreseeability may be a valid starting point, any resolution of an issue duty must also include proper analysis of such factors as evidence of a direct relationship or transaction between the parties; certainty of injury; proximity in time between the Defendant's purported negligence and the injury; the Defendant's degree of control and ability to avoid injury; policy considerations for and against the imposition of liability; and, any burdens created by the imposition of a new duty of care. Dyer, supra; Valcaniant, supra; Buczowski, supra; Groncki, supra; Schultz, supra; Friedman, supra.

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One factor clearly mitigating against the recognition of such a duty is the utter lack of control on the part of an insurance agent regarding the dissemination of certificates of insurance and any follow-up information regarding the status of insurance. The facts in this case provide a classic example: liability was thrust upon FIA in favor of Distel Tool, where there is no evidence that FIA provided the certificate to Distel Tool, or could have contacted Distel Tool regarding changes in the status of MMS's insurance! Obviously, where an agent has no control over dissemination of the certificates and/or lacks actual knowledge regarding the identity of those receiving the certificates, the insurance agent cannot be held duty-bound to verify that corrected information is conveyed or supplied! The Court of Appeals inexplicably ignored this factor.

Worse, the Court of Appeals refused to consider and then recognize that the creation of a duty of care upon insurance agents and in favor of an undeterminable number of non-clients would work a fundamental and disruptive change in the law, as well as the expectations of and the burdens upon the insurance industry.

Ordinarily, an independent insurance agent is an agent of the insured, and owes an absolute duty to the insured, only. Mate v Wolverine Mut Ins Co, 233 Mich App 14; 592 NW2d 379 (1998); Harwood v Auto Owners Ins Co, 211 Mich App 249; 535 NW2d 207 (1995), lv den, 451 Mich 874; 549 NW2d 565 (1996). Under the Workers' Compensation Placement Facility rules, this fiduciary relationship is already "stretched" as the insurance agent receives payment, specifically commissions, from the Facility and not the insured, and must follow certain procedures designed to benefit/protect the servicing carrier. **(Ex. B)** Creating yet an additional and separate duty on the part of the agents to all potential certificate holders would undeniably thrust the agent into yet another unwanted fiduciary relationship fraught with potential conflicts of interest. If questions of coverage arise, to whom does the agent first and finally respond?

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Finally, this case demonstrates that it is not necessary to impose a broad public duty of care upon an insurance agent in order to protect the primary injured party - the injured worker. Mr. Staten's workers' compensation claims were redeemed by the insurer for his statutory employer, Distel Tool, after it was discovered that MMS had inexplicably elected to forego workers' compensation liability coverage. Mr. Staten was protected by the Workers' Compensation Disability Act, and Distel Tool was protected by its own Workers' Compensation Liability Insurance. The record even confirms that: had Distel Tool not been covered by worker's compensation liability insurance, it would have been protected by general liability insurance; and, had Distel Tool not been deemed a statutory employer, Mr. Staten could have proceeded against MMS outside of the Workers' Compensation Liability statute and recovered under MMS's general liability insurance! (Tr. 6/19/02, pp 45-45, 52) See also: MCL 418.641(2); McCaul v Modern Tile & Carpet, Inc, 248 Mich App 610, 622-623; 640 NW2d 589 (2001).

In other words, there was already plenty of available compensation for Mr. Staten without creating yet another layer of liability by turning to MMS's insurance agents for yet another "pocket" of recovery! The Court of Appeals amazingly ignored this mitigating factor as well.

Indeed, the Defendant FIA respectfully suggests that, especially given the Michigan Legislature's already expressed interest in and involvement with the workers liability compensation system and the civil liability imposed on the various parties involved in the system, it would be better left to the legislature to either create a broad public duty of care upon insurance agents in favor of any recipient of a certificate of workers' compensation liability insurance, or a right of action/ subrogation by a statutory employer/carrier against an insurance agent who allegedly negligently issues a certificate of insurance. And again, the Court of Appeals below failed to even consider this

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paramount consideration of respect for the proper separation of state governmental power and authority.

The bottom line, however, is that numerous and paramount considerations of justice, policy, and common sense, operate to absolutely foreclose liability on the part of an insurance agent to any and every potential and unknown party recipient of a certificate of insurance issued by the agent.

In conclusion, the Trial Court and Court of Appeals clearly erred by determining that FIA's issuance of a certificate of insurance may properly serve as the basis of liability under a theory of negligence or negligent misrepresentation to Distel Tool, or its subrogee, MTA because: FIA had no direct contract or transaction with and made no direct misrepresentations to Distel Tool; FIA did not actually know, intend or specifically foresee Distel Tool's reliance upon the Certificate issued to David Friedman, Inc.; and, Distel Tool did not justifiably rely upon the certificate previously issued to another third party as proof of insurance coverage.

Hence, FIA respectfully requests this Honorable Court to either grant leave to appeal the clearly erroneous Court of Appeals and Trial Court opinions or peremptorily reverse the Judgment entered in favor of subrogee MTA on its negligence theory.

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ARGUMENT II:

THE TRIAL COURT AND COURT OF APPEALS ERRED AS A MATTER OF LAW BY FAILING/REFUSING TO MAKE FINDINGS OF STATUTORILY MANDATED COMPARATIVE FAULT ON THE PART OF PLAINTIFF'S SUBROGOR, DISTEL TOOL AND THE DEFENDANT, MACHINERY MAINTENANCE SPECIALISTS, INC., AND COMMITTED CLEAR ERR BY FINDING NO FAULT ON THE PART OF THE Third Party DEFENDANT WAUSAU INSURANCE COMPANIES.

If this Court rules in favor of the Defendant and Third Party Plaintiff-Appellant FIA on its argument that, as a matter of law, it owed no duty of care as claimed by Plaintiff, then the Court could deem moot the other issues raised on appeal regarding the failure of the Trial Court and Court of Appeals to properly assess the comparative liability of other at-fault parties. However, FIA respectfully requests this Court to review and independent reverse the Judgment entered by the Trial Court and the Court of Appeals Opinion affirming the Judgment, given the magnitude of the lower courts' legal and factual errors, as well as the social importance of clarifying the correct application of the comparative fault statutes.

The Michigan legislature recently adopted a comparative fault system for apportioning damages, found at MCL 600.6304, MCL 600.2959, and MCL 600. 2957[3]:

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3 **600.2957.** Tort actions; allocation of liability by trier of fact; percentage of fault, considerations; amended pleadings against nonparties, limitation period; defenses or immunities

Sec. 2957. (1) In an action based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death, the liability of each person shall be allocated under this section by the trier of fact and, subject to section 6304, in direct proportion to the person's percentage of fault. In assessing percentages of fault under this subsection, the trier of fact shall consider the fault of each person, regardless of whether the person is, or could have been, named as a party to the action.

600.2959. Tort actions; comparative fault of injured or dead person; reduction of economic damages, disallowance of non-economic damages

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Sec. 2959. In an action based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death, the court shall reduce the damages by the percentage of comparative fault of the person upon whose injury or death the damages are based as provided in section 6306. If that person's percentage of fault is greater than the aggregate fault of the other person or persons, whether or not parties to the action, the court shall reduce economic damages by the percentage of comparative fault of the person upon whose injury or death the damages are based as provided in section 6306, and noneconomic damages shall not be awarded.

Sec. 6304. (1) In an action based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death involving fault of more than 1 person, including Third Party defendants and nonparties, the court, unless otherwise agreed by all parties to the action, shall instruct the jury to answer special interrogatories or, if there is no jury, shall make findings indicating both of the following:

(a) The total amount of each plaintiff's damages.

(b) The percentage of the total fault of all persons that contributed to the death or injury, including each plaintiff and each person released from liability under section 2925d, regardless of whether the person was or could have been named as a party to the action.

(2) In determining the percentages of fault under subsection (1)(b), the trier of fact shall consider both the nature of the conduct of each person at fault and the extent of the causal relation between the conduct and the damages claimed.

(3) The court shall determine the award of damages to each plaintiff in accordance with the findings under subsection (1), subject to any reduction under subsection (5) or section 2955a or 6303, and shall enter judgment against each party, including a Third Party defendant, except that judgment shall not be entered against a person who has been released from liability as provided in section 2925d.

(4) Liability in an action to which this section applies is several only and not joint. Except as otherwise provided in subsection (6), a person shall not be required to pay damages in an amount greater than his or her percentage of fault as found under subsection (1). This subsection and section 2956 do not apply to a defendant that is jointly and severally liable under section 6312.

* * *

(8) As used in this section, "fault" includes an act, an omission, conduct, including intentional conduct, a breach of warranty, or a breach of a legal duty, or any conduct that could give rise to the imposition of strict liability, that is a proximate cause of damage sustained by a party.

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The purpose of these several statutes is to insure that exposure to liability is limited to a party's own "fair share" or *pro rata* degree of fault. Gerling Konzera Allgemeine Vershicherung Ag v Lawson, 254 Mich App 241, 247; 657 NW2d 143 (2003), lv den 467 Mich 937; 654 NW2d 916 (2003); Lamp v Reynolds, 249 Mich App 591, 596; 645 NW2d 311 (2002); Smiley v Corrigan, 248 Mich App 51, 56; 638 NW2d 151 (2001). The comparative fault statutes mandate the allocation among liability among all persons - including the plaintiff - who contributed to the accrual of plaintiff's damages: pursuant to the express legislative language, a trier of fact in a tort action must allocate liability among those at fault. Secs. 6304(1), 2959 and 2957(1); Salter v Palton, 261 Mich App 559, 565-566; 682 NW2d 537 (2004); Holton v A1 Ins Assoc, Inc, 255 Mich App 318, 323-324; 661 NW2d 248 (2003); Lamp, supra, at 605. Specifically, the trier of fact, including the trial court during a bench trial, is required to determine all at-fault persons and then assign percentages of fault after considering the nature of each person's conduct and the extent of causal relationships between the conduct and the resulting damages. Secs. 6304(1), 2957(1); Salter, supra; Lamp, supra. The requisite causal connection is established upon proof that: (1) but for the person's conduct, it is more than likely that plaintiff's damages would not have occurred; and (2) plaintiff's damages were a foreseeable consequence of the person's conduct. Lamp, supra at 599.

The requisite showing of comparative fault is not limited to evidence of negligent acts or omissions: Sec. 6304(8) expressly permits a finding of comparative fault for any wrongful or actionable act or omission, including a breach of a legal duty. Lamp, supra, at 602-605. In other words, the application of the comparative fault statutes does not depend on the type of at-fault conduct of the various parties; rather, the statutes require allocation of liability of all persons who contributed, in any fashion, to the accrual of plaintiff's damages. Id.

The interpretation and application of statutory provisions are matters of law. Crowe v Detroit, 465 Mich 1, 6; 631 NW2d 293 (2001); Lamp, supra, at 596.

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Again, MTA, as subrogee of Distel Tool, prevailed at trial against the Defendant FIA under a common law negligence theory. Plaintiff was awarded damages in the amount of $153,502.85 - the total amount of its subrogor's obligation as a statutory employer to pay workers' compensation benefits to Tives Staten and all legal fees related to the defense of the Staten claim. The Trial Court determined that FIA was 100 percent liable for these damages despite the fact that during the trial, FIA presented unrebutted proofs which established comparative fault on the part of Distel Tool, MMS and Wausau.

Specifically, in its original Op. & Order dated 12/13/02, the Trial Court made a factual determination that Wausau was without fault, and therefore not liable for any portion of the alleged damages. (Op. & Order 12/13/02, pp 12-13) However, in this Op. & Order, the Trial Court utterly failed to address the fair share of liability to be born by MMS and Distel Tool. Via a Motion to Amend Findings of Fact and Conclusions of Law, the Defendant FIA specifically requested the Trial Court to make/amend the mandatory allocation of comparative liability among all the at-fault parties, but the Court summarily refused to do so. (Order 3/6/03)

The Trial Court's Opinions and Orders on the issue of comparative fault are nothing but clearly erroneous.

First, the Trial Court committed clear error with its factual determination that Wausau shared no part of the liability to Distel Tool. The Trial Court justified its finding of nonliability as follows:

1. There was evidence in Wausau's files that it mailed the Notice of Cancellation and Cancellation to FIA in January and February of 1998, respectively;

2. FIA had neither the express nor implied consent of Wausau to issue the certificate of insurance on 3/6/98 to David Friedman, Inc.;

3. There was no proof in Wausau's files that it received a copy of the 3/6/98 certificate;

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4. Wausau could not have foreseen that an unknown third party, Distel Tool, would rely upon the 3/6/98 certificate issued to David Friedman, Inc.; and,

5. FIA's violation of the Workers' Compensation Placement Facility Handbook was the sole cause of the damages sustained by Distel Tool after Distel Tool was deemed the statutory employer of Tives Staten. (Op. & Order 12/13/02, pp 12-13)

However, the failure of Wausau and FIA to receive mail from each other should have been assigned at least equal weight by the Trial Court since both parties equally relied upon negative evidence; that is, the lack of evidence regarding the relevant correspondence in their paper files. Certainly, Wausau's negative evidence in this regard should not have "carried the day": while FIA's representatives testified based upon an agency file complete with the sole exception of the Notice of Cancellation and Cancellation purportedly sent by Wausau, the Wausau representative readily and repeatedly admitted that the insurer's file was woefully incomplete! Specifically, the Wausau representative conceded that the carrier's paper file did not contain copies of many significant documents such as letters and notices allegedly sent to MMS and FIA (Tr. 4/8/02, pp 96, 107, 121-122, 126). The Wausau representative even admitted that the insurer's file contained no definitive proof that FIA, in fact, received copies of the Notice of Cancellation and Cancellation sent to MMS! (Tr. 4/8/02, p 126)

Additionally, the record clearly demonstrates that the Trial Court made a definite mistake when concluding that because FIA never directly contacted Wausau to obtain permission to issue the certificates of insurance on 3/6/98, FIA lacked authorization to issue the certificates, as defined by the Placement Facility Handbook. The Trial Court's conclusion that the Placement Facility Handbook required express authorizations runs afoul of both the actual record and established agency law.

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Long standing Michigan case law precedent establishes that the actual authority of an insurance agent to act for an insurer may occur under either express or implied authority. Meretta v Peach, 195 Mich App 695, 698; 491 NW2d 278 (1992); Palmer v Pacific Indemnity Co, 74 Mich App 259, 268; 254 NW2d 52 (1997). Implied authority is defined as the authority which an agent believes he possesses in accordance with the general custom, usages and procedures in the insurance industry. Meretta, supra, citing to 1 Restatement Agency 2nd §36; Palmer, supra. The burden is upon an insurer to refute evidence of an implied agency with definitive proof that the insurer had no knowledge of the customs, usages and procedures and/or that the agent acted outside of such customs, usages and procedures. Meretta, supra, citing to Sec. 36 of the Restatement Agency and 3 Am Jur 2d, Agency §359, p 870.

In this case, FIA presented evidence via the testimony of its representatives David Clappison and Rebecca Steingold, Plaintiff's expert, and two defense experts, that:

1. Neither the general customs, usages, or procedures of the insurance agency nor the Facility Handbook requires the express grant of authority by a service carrier/insurer to an insurance agent before the agent may properly issue certificates of insurance on behalf of this carrier;

2. The customs, usages and practices within the insurance industry in general, and when dealing with workers' compensation liability insurance through a placement facility in particular, is to convey actual, albeit implied, authority upon an insurance agent to issue certificates of insurance for placement facility carriers where the servicing carrier permits the issuance of the certificates over time, without objecting to such acts or instructing the agent to cease and desist such acts;

3. Any implied authority enjoyed by an insurance agent would supersede or nullify the Placement Facility written rules;

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4. Between 1996 and 1998, FIA "routinely" issued over 90 certificates of insurance for policies issued by Wausau via the Placement Facility, Wausau actually received copies of these certificates as evidenced by occasional action to correct information on the certificates, but Wausau never objected to FIA directly issuing certificates of insurance on its policies, nor instructed FIA to cease and desist such practices; and,

5. On March 6, 1998, FIA correctly believed it possessed actual authority to issue certificates of insurance on Wausau Workers' Compensation Liability Policies in accordance with the general customs, practices and usages, as well as the actual patterns, customs and business practices established over time between Wausau and FIA, and FIA acted within the scope of this authority. (Tr. 4/8/02, pp 32, 51-55, 64, 66-67, 199, 202-204; 6/19/02, pp 123-124, 127, 129; 8/28/02, pp 10, 15-17, 21, 57-58, 61-63, 99-100, 104, 128-133)

Wausau presented absolutely no evidence to refute that it either lacked knowledge of FIA's repeated issuance of certificates of insurance on Placement Facility policies, or that FIA acted outside the general customs, practices and uses with respect to implied authority. Rather, Wausau's own representative admitted that, even as late as 2001, Wausau never attempted to contact FIA and instruct the agency to cease direct issuance of certificates of insurance on policies issued through the workers' compensation placement facility. (Tr. 4/8/02, pp 120-121)

In short, the record at trial clearly substantiates the firm and definite conclusion that the Trial Court committed reversible error by refusing to assign any percentage of comparative fault on the part of Wausau based upon a clearly erroneous determinations regarding both the weight of the evidence and that FIA's authority to directly issue a certificate of insurance on behalf of Wausau. American Alternative Ins Co, supra; Meretta, supra; Palmer, supra. Therefore, the Court of Appeals

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should have reversed the judgment against the Third Party Plaintiff, FIA, and remanded the matter for reallocation of the liability of Wausau for Plaintiff's damages.

In finding no comparative fault on the part of the Third Party Defendant, Wausau, the Court of Appeals focused exclusively upon Wausau's failure to respond to receipt of a copy of the certificate of insurance issued by FIA after Wausau canceled its policy, concluding that such "after the fact" negligence on the part of Wausau did not undermine the Trial Court's determination that FIA was 100 percent responsible for Plaintiff's damages. Again, the Trial Court had concluded that FIA was negligent for issuing the certificate on behalf of the Wausau's insured without either written authorization or verbal confirmation from Wausau. However, the Court of Appeals totally ignored the undisputed proof that FIA only issued the certificate as a direct result of Wausau's acquiescence in this practice! In other words, but for Wausau's grant of implied authority to FIA to directly issue the certificates on behalf of Wausau Insurance, FIA would never have issued the certificate on March 6, 1998, on behalf of MMS, and Plaintiff's damages would never have occurred! The abject refusal by the Trial Court and then Court of Appeals to even consider Wausau's admitted acquiescence as evidence of comparative negligence warrants reversal.

The Court of Appeals engaged in a similar and reversible form of tunnel vision with respect to Plaintiff's Subrogor, Distel Tool, and the co-Defendant, MMS.[4]

With respect to Distel Tool, the Court of Appeals concluded, without citations to any legal authority or the record at trial, it would be "absurd" to require a third party's reliance upon information supplied by an insurance agent for the benefit of another, to be reasonable or justified.

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[4] The Trial Court clearly erred by refusing to make any express determinations regarding the comparative fault of Distel Tool and MMS: as the trier of fact, the Trial Court was required by legislative mandate to assess the relative liability of all potential at-fault parties. MCL 600.6304; MCL 600.2959; MCL 600.2957; Salter, supra; Holton, supra; Lamp, supra.

Such a conclusion runs totally afoul of controlling Michigan and compelling sister jurisdiction authority. See: Williams v Polgar, supra; Friedman, supra; Stockler, supra; Malik, supra; Rogers, supra; Pitsch, supra; Quigley, supra; Lu-An-Do, Inc, supra.

The Court of Appeals' conclusion that Distel Tool was in no way involved certainly runs afoul of the undisputed evidence at trial. Specifically, it is undisputed that Distel Tool only permitted Tives Staten on its premises after MMS supplied it with a certificate of workers' compensation liability insurance. (Tr. 2/22/02, pp 53-56; 6/19/02, p 10) Yet, Distel Tool admittedly accepted and relied upon, as proof of insurance, a copy of a certificate issued sometime previously to another client of MMS, notwithstanding the fact that the certificate expressly states that it is to be relied upon by the named holder, only, as information, only, valid on the date of issuance, only! Indeed, Distel Tool's representative at trial admitted that:

1. The certificate provided by MMS was reliable information as to the status of MMS's insurance with Wausau as of 3/6/98, only;

2. Distel Tool never insisted that MMS obtain a current certificate issued directly to Distel Tool; and,

3. Distel Tool took no steps to verify that the coverage with Wausau was in effect subsequent to 3/6/98. (Tr. 6/19/02, pp 14-19, 22)

Plaintiff's own expert agreed with defense representatives and expert witnesses that it is absolutely unreasonable for a third party receiving a copy of the certificate issued for another holder to expect to receive current and accurate insurance information. (Tr. 2/22/02, pp 165-168; 4/8/02, pp 57-58, 68, 72, 173-176, 213; 6/19/02, pp 132-133; 8/28/02, pp 23, 27, 150, 151).

In short, not only did the Trial Court and Court of Appeals err as a matter of law by refusing to assess Distel Tool's own comparative degree of fault, the record clearly requires remand for a determination that Distel Tool's own negligent acts and omissions were a

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significant cause of the damages allegedly arising out of Distel Tool's unjustifiable reliance upon the certificate of insurance at issue in this case.

With respect to MMS, the defendant FIA submits that remand on the issue of comparative fault may not even be necessary. Under cross-examination Arnold Primak, the owner of MMS admitted he did not ask or tell FIA about the February 1998 cancellation when he called the agency in March to request the certificate for David Friedman:

> Q Sure. Isn't it true sir, that when you called the Farmington Agency on or about March 6, 1998 and spoke with Becky Steingold or Dave Clappison and asked that they generate a certificate of insurance for the benefit of David Friedman, Inc. that you did not notify Becky or David that you had previously received a certified letter from Wausau advising that they intended to cancel your policy on or about February 20, 1998?
> A I was under the opinion they were aware of that, so I didn't ask them.
> Q You didn't tell them?
> A No.
> Q Is that correct?
> A Well, they should have known. They're my carrier.
> Q No. But that's not my question. My question is, you did not tell them during that conversation, isn't that correct?
> A Is that a couple months after that or let's see?
> Q You signed for it on January 29th.
> A Okay.
> Q You called on or about March 6th?
> A Yes. For a certificate of insurance for David Friedman.
> Q Yes. Isn't it true that during that conversation you did not advise the person you spoke to at Farmington that your policy had been canceled?
> A Correct.
> (Tr. 2/22/02, pp 80-81)

Moreover, the Trial Court determined that MMS was 100 percent liable to Plaintiff for $130,000 in workers' compensation benefits paid to Staten when granting a directed verdict in favor of Plaintiff pursuant to MCL 418.171[5] on its statutory its statutory indemnity claims. MMS did not

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5 **418.171**. Statutory principals, liability under act, indemnification; contractors; subcontractors; common law recovery prohibited

Sec. 171. (1) If any employer subject to the provisions of this act, in this section referred to as the principal, contracts with any other person, in this section referred to as the contractor, who is not subject to this act or who has not

object to the entry of the directed verdict (Tr. 2/22/02, pp 117-118) and could not have collaterally attacked this fact since, in a separate proceeding, the Workers Compensation Bureau had already made final determinations that Mr. Staten was an employee of MMS at the time of his injury and that MMS had breached its statutory obligation under MCL 418.611[6] to secure the payment of workers

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complied with the provisions of section 611, [FN1] and who does not become subject to this act or comply with the provisions of section 611 prior to the date of the injury or death for which claim is made for the execution by or under the contractor of the whole or any part of any work undertaken by the principal, the principal shall be liable to pay to any person employed in the execution of the work any compensation under this act which he or she would have been liable to pay if that person had been immediately employed by the principal. If compensation is claimed from or proceedings are taken against the principal, then, in the application of this act, reference to the principal shall be substituted for reference to the employer, except that the amount of compensation shall be calculated with reference to the earnings of the person under the employer by whom he or she is immediately employed. A contractor shall be deemed to include subcontractors in all cases where the principal gives permission that the work or any part thereof be performed under subcontract.

(2) If the principal is liable to pay compensation under this section, he or she shall be entitled to be indemnified by the contractor or subcontractor. The employee shall not be entitled to recover at common law against the contractor for any damages arising from such injury if he or she takes compensation from such principal. The principal, in case he or she pays compensation to the employee of such contractor, may recover the amount so paid in an action against such contractor.

6 Sec. 611. (1) Each employer under this act, subject to the approval of the director; shall secure the payment of compensation under this act by either of the following methods:

(a) By receiving authorization from the director to be a self-insurer. In the case of an individual employer, the director may grant that authorization upon a reasonable showing by the employer of the employer's solvency and financial ability to pay the compensation and benefits provided for in this act and to make payments directly to the employer's employees as the employees become entitled to receive the payment under the terms and conditions of this act and pursuant to R 408.43c of the Michigan administrative code. If the director determines it to be necessary, the director shall **require** the furnishing of a bond or other security in a reasonable form and amount. Such security as may be **required** by the director may be provided by furnishing specific excess **insurance**, aggregate excess **insurance** coverage through a carrier authorized to write in this state in an amount acceptable to the director, a surety bond, an irrevocable letter of credit in a format acceptable to the bureau, and claims payment guarantees.

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compensation benefits for all employees (Tr. 6/19/02 pp 34-35, 43-45, 63). See In Re: Hatcher, 443 Mich 426, 439; 505 NW2d 834 (1993).

Hence, at trial it was undisputed that MMS breached its duty under MCL 418.611 to indemnify Distel Tool for the $130,000 in workers compensation benefits paid to Mr. Staten. It was also undisputed that Distel Tool incurred over $23,000 in attorney fees to defend the Staten workers' compensation claim solely as a result of MMS's unsuccessful attempts to dispute that Tives Staten was an MMS employee at the time of his injury on Distel Tool's premises as a defense to its failure to abide with the terms of:

1. MCL 418.611(1) regarding employee benefits;

2. Its contract with Wausau regarding prompt and full payment of insurance premiums and cooperation with carrier audits; and,

3. The Facility Handbook regarding compliance with the terms and conditions of the insurance policy and keeping the agent fully advised as to any and all changes in coverage (**Ex. B**, pp I-2 and I-3; Tr. 6/19/02, pp 46, 62).

Finally, it was undisputed that MMS bore the entire blame for Distel Tool's initial exposure to and ultimate liability as the statutory employer of Tives Staten: even Plaintiff's expert agreed with defense witnesses that the instant subrogation action would not have been filed, but for MMS's breaches of various legal duties - including the violation of the very Facility Handbook relied upon by the Trial Court to impose liability upon FIA. (Tr. 2/22/02, pp 154-155, 170-171, 179, 184; 4/8/02, pp 17, 18, 24, 36, 59-60, 177-178, 183-184, 187-188; 6/19/02, pp 10, 26-27, 64)

According to the Court of Appeals, MMS could not be held comparatively at fault merely for taking an ultimately unsuccessful position regarding Tives Staten's employment status.

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(b) By **insuring** against liability with an insurer authorized to transact the business of **worker's compensation insurance** within this state.

However, the record undeniably demonstrates that MMS's fault for Plaintiff's damages was in no fashion limited to its good (or bad) faith attempt to prove it was not Tives Staten's employer for the purposes of workers compensation liability. Indeed, given the record at trial, the only available conclusion is that MMS's breach of numerous statutory, contractual and common law legal duties was the sole proximate cause of all Plaintiff's damages; specifically, the $130,000 in workers' compensation benefits and over $23,000 in attorney fees. The bottom line is that the Trial Court not only erred as a matter of law by refusing to make any assessment of the comparative fault of MMS, the record now permits this Court to find that the Trial Court and Court of Appeals committed clear and reversible error by failing to assess MMS's fault at 100 percent!

However, if this Court is not inclined to make a final determination as to the percentage of fault attributable to MMS, then this case must now be remanded with instructions to the Trial Court to determine the percentages of fault attributable to MMS, Distel Tool and Wausau, after properly and fully considering the nature of each of these parties' conduct and the full extent of the causal relationship between the conduct and Plaintiff's damages. Holton, supra; Lamp, supra; Commercial Union Ins Co, supra; Federal Kemper Ins Co, supra.

In conclusion, FIA maintains that the Judgment finding it 100 percent liable for Plaintiff's damages must be reversed on the basis that, as a matter of law, FIA owed no actionable duty of care to Plaintiff's subrogor, Distel Tool. In the alternative, however, this Judgment must be reversed and the liability of FIA re-evaluated either by this Court or by the Trial Court on remand, with damages, if any, assessed against FIA only after the proper analysis of the mandated assessment of comparative fault on the part of Wausau, Distel Tool and MMS.

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RELIEF REQUESTED

For the reasons stated herein, the Defendant and Third Party Plaintiff-Appellant, Farmington Insurance Agency, L.L.C., respectfully requests this Honorable Court to grant leave to review the Final Judgment entered against it by the Trial Court. Alternatively, this Defendant/Third Party Plaintiff respectfully requests this Honorable Court to peremptorily reverse the Final Judgment in its entirety, or, make its own determinations regarding the comparative fault of the parties based upon the record, or, remand with instructions that the Trial Court determine the percentages of fault attributable to MMS, Distel Tool and Wausau after properly and fully considering the nature of each of these parties' conduct and the full extent of the causal relationship between the conduct and Plaintiff's damages.

Respectfully submitted,

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